

MEMORANDUM OF LAW

DATE: April 4, 1990

TO: Ralph Shackelford, Purchasing Agent

FROM: City Attorney

SUBJECT: Unsigned Bid

You recently asked if a bid submitted without a signature could be accepted; that is, whether the lack of signature was a technicality that could be waived by the Purchasing Agent. Case law on that particular subject is unclear. One of the earliest California cases, *Williams v. Bergin*, 129 Cal. 461 (1900), concerned a bid where the name of the contractor did not appear on the contract, nor was the bid signed, although the proposals published by the Board of Supervisors and a signed bid bond were attached to the blank contract. The California Supreme Court in that case questioned whether, if the contractor had been awarded the contract, and had then declined to enter into the formal contract, a recovery could have been had upon the bond. The court found that "recovery could not have been had. There is no consideration for the bond unless there is a bid . . . and surely if there was not even the semblance of a bid the bond was without consideration . . . ." *Williams v. Bergin*, 129 Cal. at 465. The court further held that "the bid must be in such form that upon its acceptance a valid obligation is put upon the bidder to enter into the formal contract . . . ." *Id.* Therefore, the court held that the contract was void.

A 1969 U.S. Court of Appeals case, *Superior Oil Company v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969), concerned mineral leases of oil. The regulations pertaining to the bids for leases specifically stated that bids must be sealed and signed. The court held that:

A valid contract can be spelled out of multiple papers, some unsigned, if they are referred to in a signed document and thus become incorporated by reference. But this . . . principle . . . does not control over specific regulations implementing a carefully

constructed scheme of sealed bids in public contracts. No authority has been cited . . .

which compels . . . the use of materials extraneous to the sealed bid to remedy deficiencies in the sealed bid itself.

Superior Oil Company v. Udall, 409 F.2d at 1121.

The court proceeded to hold that "the general rules of government contract law must give way to the specific regulations . . . governing this kind of transaction." *Id.* The court referred to an opinion of the Comptroller General that stated:

The strict maintenance of the competitive bidding procedures required by law is infinitely more in the public interest than obtaining a pecuniary advantage in individual cases by permitting practices which do violence to the spirit and purpose of the law. Conditions or reservations which give a bidder a chance to second-guess his competitors after bid-opening must be regarded as fatal to the bid. If the bidder chooses to remain silent after the opening of bids he could disavow the bid because of the absence of a signature. This would place him in a position to make an election either to abide by his bid or to claim that the bid was submitted in error by a person without authority to enter into contracts on behalf of a bidder. This would give him more than one chance under the same invitation. Moreover, when a bid is non-responsive in a material respect, it cannot be corrected even though the nonresponsiveness may be due to mistake or oversight (emphasis added) (citations omitted).

Superior Oil Company v. Udall, 409 F.2d at 1119-1120.

The court did not see the lack of signature on the contract as a technicality that could be appropriately waived.

The latest California case concerning lack of signature on a bid is *Menefee v. County of Fresno*, 163 Cal. App. 3d 1175, 1179 (1985). In that case the court analyzed the case law on the subject, stating:

We have found no published cases in California involving a bid that was fully completed as to the terms and conditions of the bid, signed in other places and properly delivered, but not signed in the one place required by the bid form. Some cases in other

jurisdictions favor . . . the position that the failure to sign a bid is not a material breach and allow waiver by the contracting entity. Other cases find that the failure to sign makes a bid invalid, giving the bidder an unfair advantage and supporting rejection of the unsigned bid . . . . All of these cases take place against various backgrounds of regulations and specifications in notices of sale or requests for bids. Nevertheless, there are two common themes: First, some courts allow the signature on a bid bond to cure the absence of a signature on the bid itself. Second, specific regulations or components of the request for bids may require a signature and control over general principles of government contract law (citations omitted).

The court distinguished the California Supreme Court opinion in *Williams v. Bergin* by noting that in that case the bid was:

Lacking more than a signature; it had neither a total price nor the bidder's name. So *Williams* can be read narrowly as holding only that a 'bid' cannot be cured if it is not a bid at all . . . even if incorporation of the bid bond signature into the bid is precluded by California law, the absence of only one signature in an otherwise complete bid should be waivable by the public entity.

*Id.*

The court in *Menefee* held that requirements that the bid be signed controlled the bidder, not the public agency. "It requires a bidder to sign his bid, but does not control the board's discretion to waive the requirement." *Id.* at 1180. The court concluded by holding that as long as there were no specific ordinance or charter provisions that required a signature, the signature requirement of the bid could be waived by the public entity.

As you can see, California courts differ on exactly how this question should be decided depending on the specific facts of each case. Since The City of San Diego does not have either an ordinance or charter provision specifically mandating signatures on bids, that requirement may be waived by the Purchasing Agent if certain conditions are met. It is therefore our opinion that each situation must be analyzed separately to determine if (1)

there are other signatures on the bond and in the bid package so as to permit waiver by the public entity; (2) if the contractor is awarded the contract and declines to enter into the formal contract, a recovery could be had upon the bond; and, (3) if acceptance of the bid without a signature would give that bidder an unfair advantage over other bidders.

While there is no single answer to your question that would apply in all circumstances, the use of the above cited criteria should guide you in determining when and under what express circumstances lack of a signature will invalidate a bid.

Please feel free to review individual circumstances with us should future cases arise.

JOHN W. WITT, City Attorney  
Mary Kay Jackson  
Deputy City Attorney

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