

## MEMORANDUM OF LAW

DATE: April 9, 1991

TO: Jack McGrory, City Manager

FROM: City Attorney

SUBJECT: Selection for Professional Services; Application of California's "Little Brooks Act"

By memorandum, you ask several questions related to the applicability of the "Little Brooks Act" (codified as California Government Code section 4525 et seq.) on The City of San Diego and the Redevelopment Agency of The City of San Diego. The Little Brooks Act (the "Act") governs the selection of certain professional services as set out in greater detail below. Each of your questions will be answered separately.

### Question No. 1

As a charter city, does the Little Brooks Act (the "Act") apply to City of San Diego ("City") contracts and selection procedures which are locally funded and local in nature?

### Response

No. Irrespective of the language of the Act, it is our view, based upon applicable California case law, that the Act does not apply to City contracts and selection procedures which are locally funded and local in nature.

### Analysis

The Act sets out a selection procedure purportedly to be followed by State and local officials for selecting the professional services of private architectural, engineering, environmental, land surveying or construction management firms. Of relevance to your inquiry here, Section 4525(c) specifically defines a "Local agency head" to be "the secretary, administrator, or head of a department, agency, or bureau of any city . . . whether general law or chartered."

The heart of the selection procedure is that firms or individuals offering such professional services be selected "on the basis of the demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required." Government Code section 4526. This has been interpreted by various professional associations to mean that when a state or local entity puts out a request for proposal or qualifications, cost of the professional services cannot be considered as that fact presumably has nothing to do with the

determination of professional qualifications.

They assert that cost may only be considered after the selection of the most qualified candidate. If for some reason, a "fair and reasonable" cost to the governmental entity cannot be negotiated with the most qualified candidate, then negotiations may be commenced with the next most qualified candidate and so on. These provisions have caused concern and some confusion on the part of municipalities, as it has not been unusual to ask for cost estimates when seeking professional services.

The City of San Diego is a charter city and as such is granted certain powers under the California Constitution to regulate independent of state laws in those matters deemed to be a municipal affair:

It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.

City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith. Cal. Const. art. XI, Section 5(a).

While the Act states on its face that it does apply to charter cities, the real inquiry is whether the selection of the type of professional services named in the Act is a municipal or statewide concern. As noted in *Bishop v. City of San Jose*, 1 Cal.3d 56, 63 (1969):

However, the fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than that of statewide concern . . . the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern. (Emphasis added.)

There are no hard and fast rules as to what constitutes a municipal concern and courts have generally made the determination on a case-by-case basis. *Bishop v. City of San Jose*, Id. at 62. However, there is case law which would indicate that contracting for the type of professional services contemplated in the Act would be deemed a municipal concern. In *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 535 (1973), the court held:

It has been held . . . that the mode of contracting for

city improvements is a municipal affair. Thus, a statutory requirement for a labor and materials bond for state, municipal or other public works has been held inapplicable to a city whose charter provides a complete scheme for the letting of such contracts and the terms and conditions thereof.

The court goes on to say on page 536, "Whatever the subject matter of a municipal contract, it is manifest that the mode in which a city chooses to contract is a municipal affair."

The holding of Smith in regard to whether a city's method of contracting work is a municipal affair was reaffirmed in *Piledrivers' Local Union No. 2375 v. City of Santa Monica*, 151 Cal. App. 3d, 509-11 (1984).

Thus, in situations in which the City contracts and selects professional consultants for projects which are locally funded and local in nature, it would appear that such contracts would be considered a municipal affair and the Act would not apply, irrespective of the language in the Act to the contrary.

#### Question No. 2

Does the Act apply to City contracts which are locally funded and regional in nature such as the consultant selection process to evaluate the feasibility of a regional crime lab?

#### Response

Generally speaking, the Act would apply to City contracts which are locally funded and regional in nature.

#### Analysis

According to the California Supreme Court case of *Committee of Seven Thousand v. Superior Court*, 45 Cal.3d 491, 505 (1988), a statewide concern includes "matters the impact of which is primarily regional rather than truly statewide." In determining if a matter is "primarily regional" one has to look at what extent a municipal action "affects persons outside of the municipality," because to the extent such action does affect those outside of the municipality, the action is seen to be a "matter which the state is empowered to prohibit or regulate." See *id.* at 505. The fact the contract is City funded is not relevant.

Using the example you present, i.e. the regional crime lab, it seems the Act would apply, as the crime lab (as I understand it) is to be used by both City and County of San Diego law enforcement officers.

#### Question No. 3

Does the Act apply to City contracts in which the funding is derived from the State or Federal government?

#### Response

This question is almost impossible to answer with a simple "yes" or "no." The requirements of the State or Federal funding would have to be looked at in conjunction with the scope of the contract to determine if it is local or regional in nature. Assuming no restrictions, it would

not apply to City contracts dealing with municipal concerns, but would apply to contracts having to do with regional matters.

Question No. 4

Does the Act apply to the City's Redevelopment Agency?

Response

The Act does apply to the City's Redevelopment Agency.

Analysis

The Redevelopment Agency of The City of San Diego (the "Agency") is a separate governmental entity from the City. "There is in each community a public body, corporate and politic, known as the redevelopment agency of the community." California Health and Safety Code section 33100. A redevelopment agency is created by ordinance of the legislative body of the community (see Health and Safety Code sections 33101 through 33105) and has the powers expressly granted to it by the State Legislature.

Article 3 of the California Community Redevelopment Law (codified as California Health and Safety Code sections 33120 through 33136) sets out the general powers of the redevelopment agency. Of relevance to this discussion, a redevelopment agency may "make and execute contracts and other instruments necessary or convenient to the exercise of its powers." See id. Section 33125(c).

The Agency is essentially a creation of State law. It is not an entity of the City. As such, it is not entitled to the same power and authority as the City to govern its own affairs under the California Constitution (art. XI, Section 5(a)).

Caveat and Conclusion

While this office believes there are instances in which the Act applies to City contracts and that it does apply to Agency contracts, we also believe there may be instances when price may be included in a RFP response. The Act does not contain a prohibition against requesting a price or a cost estimate. An argument can be made that price quotes can be used as another criteria in determining a consultant's qualifications. However, as you know, most engineering and architectural associations refute this, so prior to asking for a price quote, the process should be thoroughly considered in order to justify this as one of several criteria to choose a consultant of "demonstrated competence."

If you have any other questions, or wish to discuss the matter further, please contact me at your convenience.

JOHN W. WITT, City Attorney

By

Allisyn L. Thomas

Deputy City Attorney

ALT:lc:612(x043.2)

cc Maureen A. Stapleton

Severo Esquivel

Milon Mills, Jr.

M. Victor Rollinger  
Tina Christiansen  
Kurt Chilcott  
Pamela M. Hamilton  
Jerome Grooms  
ML-91-28