

MEMORANDUM OF LAW

DATE: October 15, 1991

TO: Bill Hanley, Deputy Director, Contract Management Division,
Clean Water Program

FROM: City Attorney

SUBJECT: Prequalification for Construction Contracts

You have asked this office to address the issue of prequalification of bidders for construction contracts beginning with the Point Loma Outfall Extension.

DISCUSSION

San Diego City Charter section 94 mandates award of City construction contracts to the lowest responsible and reliable bidder. Section 94 reads, in relevant part:

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, not less than ten days after advertising for one day in the official newspaper of the City for sealed proposals for the work contemplated.

City of Inglewood-L.A. County Civic Center Auth. v. Superior Court provides the controlling interpretation of 'responsible.'

The word 'responsible' . . . is not necessarily employed in the sense of a bidder who is trustworthy so that a finding of nonresponsibility connotes untrustworthiness. Rather, while that term includes the attribute of trustworthiness, it also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work.

City of Inglewood-L.A. County Civic Center Auth. v. Superior Court, 7 Cal. 3d 861, 867 (1972).

Inglewood holds that "a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e. not qualified to do the particular work under consideration." *Id.* at 867.

Therefore, in accepting or rejecting bids for construction work, the evaluation made should be limited to the contractor's qualification to do the work as well as to the estimated cost of completion.

To permit a local public works contracting agency to expressly or impliedly reject the bid of a qualified and responsible lowest monetary bidder in favor of a higher bidder deemed to be more qualified frustrates the very purpose of competitive bidding laws and violates the interest of the public in having public works projects awarded without favoritism, without excessive cost, and constructed at the lowest price consistent with the reasonable quality and expectation of completion.

Id. at 867.

In addition to the Charter section 94 requirement of lowest responsible bidder, Charter section 35 requires sealed bids and competitive prices. Both Charter provisions are made applicable to public works contracts by San Diego Municipal Code section 22.0210 et seq. Provisions of statutes, charters, and ordinances requiring competitive bidding are mandatory, and any contract entered into without following the required bidding procedure is void and unenforceable. *Miller v. McKinnon*, 20 Cal. 2d 83, 87-89 (1942). "Where public works contracts are required to be awarded after public competitive bidding, 'It is a long and well established rule that the proposals and specifications inviting such bids must be free of any restrictions tending to stifle competition'." 47 Op. Att'y Gen. 159, 160 (1966) citing *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 821 (1962).

Taken together, Charter sections 94 and 35 preclude the prequalification of bidders to any discretionary list of perceived competent companies. However, since the term responsible does include fitness and capacity to perform, minimum experiential and financial limitations may properly be included in the bidding documents.

To the extent that a particular construction project requires a higher degree of responsibility, i.e., trustworthiness, qualifications, fitness and capacity to perform the work involved, terms may be included in the invitation to bid document which will actively solicit and encourage those firms which can responsibly perform the work. To maintain the competitive bid process required in Charter sections 94 and 35, caution must be exercised in defining the terms so as not to particularize the bid document to a single firm. This is so because it is important to maintain integrity in government and because of the ease with which policy goals underlying competitive bidding may be surreptitiously

undercut. *Konica Business Machines U.S.A., Inc. v. Regents of University of California*, 206 Cal. App. 3d 449, 456-457 (1988).

We trust this explanation is helpful in addressing your concern. If you have further questions, please call us.

JOHN W. WITT, City Attorney

By

Marguerite S. Strand

Deputy City Attorney

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cc Gene Taglienti,

Principal Contract Specialist

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