MEMORANDUM OF LAW

DATE: November 29, 1991
TO: F.D. Schlesinger, Clean Water Program Director
FROM: City Attorney
SUBJECT: Operation and Maintenance Support Services for the Clean Water Program

By memorandum dated November 19, 1991, you explained that the Clean Water Program has a need for Operation and Maintenance Support Services ("O & M Services") to ensure that procedures, processes, and staff are in place to test, operate, and maintain newly constructed facilities. These O & M Services will be required for the duration of Phase I of the Clean Water Program (to the year 2003) and have an estimated cost of $15 million. You asked that this office provide an opinion as to the appropriateness of contracting for these services by amendment to the existing contract of either the Program Manager (James M. Montgomery, Consulting Engineers, Inc.) or the Construction Manager (Sverdrup Corporation). The stated rationale for incorporating all O & M Services into one of these existing contracts would be for the attainment of continuity, efficiency, and cost savings in the Clean Water Program.

ANALYSIS

The initial premise is that O & M Services are "professional services" in the legal sense, in that they entail services of an engineering nature as well as incidental services that members of the engineering profession may logically or justifiably perform. Government Code section 4525(d). As such, these services are not to be contracted on the basis of competitive bidding, but instead on the basis of demonstrated competence and on the professional qualifications necessary for satisfactory performance. Government Code section 4526. The official policy of the City of San Diego is in accord with State law on this principle. City Council Policy 300-7 provides:

It is the policy of the City that selection of consultants be made from as broad a base of applicants as possible and the choice be based on demonstrated capabilities or specific expertise. The type and scope of the required service or product must be clearly defined by the City Manager to determine whether it can be most efficiently provided by City staff or by a consultant, and where a consultant is chosen, whether licensed or non-licensed services are necessary. A licensed consultant will be selected where the significant portion of the service or product requires such skills and will be chosen using a nomination process with a negotiated contract. In those cases where the significant portion of the service or product does not require licensed skills, the selection process must be open and competitive involving comparison of cost

statements and work effort.

The existing contracts of both the Program Manager and the Construction ManagerF

At this time the City has executed only a limited agreement with the Construction Manager for preconstruction tasks related to the Point Loma Outfall. The larger balance of the negotiated agreement is presently docketed for City Council action, and thus this discussion will assume full Council acceptance of the agreement.

were entered through the process of nomination and negotiation as required by Council Policy 300-7. We are informed that O & M Services require licensed skills, so these too should be contracted through a negotiated process.

The question thus becomes whether an entirely new process of nomination and negotiation must be undertaken to contract for O & M Services, or if on the contrary these services could be incorporated by amendment into one of the two existing contracts. If the latter, some rational basis must exist for limiting consideration to these two agreements.

Generally, amendments to consultant's agreements are proper where they are reasonably necessary or helpful to the full realization of the benefits sought to be derived from the original agreement. The term "amendment" is defined to mean "to change or modify for the better." Black's Law Dictionary 6th Ed., p. 81 (1991). As such, an amendment to a consultant agreement should have a common objective to the original agreement. Although Council Policy 300-7 does not specifically address the topic of amendments, it is express in stating that "the type and scope of the service or product must be clearly defined . . . ." The policy thus requires some particularity as to the scope of the original agreement, but as a practical matter amendments are not precluded if they further the objectives specified in the original agreement.

It is recognized that the scope of the Clean Water Program is itself largely a matter of evolvement, and therefore its consultant contracts by necessity are entered with an expectation that they will be amended as the program takes shape. We are advised that the contract with the Program Manager has already been amended eight times, which is some indication of the intended flexibility of the agreement.

The ratio of scope between the original agreement and the amendment is also an important consideration. If amendments become larger than the contracts they amend, some doubt may arise as to whether subjects covered in the amendments were truly intended to be within the objectives of the original contract. We are aware of no laws which limit the size of amendments, but size is related to the essential question concerning the intended scope of the original agreements. At an estimated cost of $15 million, the proposed O & M Services amendment certainly seems to be proportionately significant. For this reason, it is necessary to discuss

whether the scope of the amendment would be within the reasonably intended objectives of the original agreements.

The purpose of this Program Manager's contract is to provide for professional engineering consultation throughout all phases of the Clean Water Program. With such a broad objective it is clear that O & M Services could be viewed as an element of intended scope. In fact, O & M Services are generally specified in Article 1 of the original agreement under the title "Startup and Testing Phase," and have since been particularly identified in Amendment No. 7 (Task 7.8). These elements of O & M Services are limited at this time, extending through August 1992. Given these circumstances we conclude that it was within the reasonable intendment of the parties that the Program Manager's contract might be amended to provide for the performance of all O & M Services in Phase I of the Clean Water Program.

The Construction Manager's contract also contemplates the performance of O & M Services, at least with respect to projects in the North City Subsystem, the Point Loma Outfall Extension, and the Fiesta Island Replacement Project - all major components of Phase I of the program. Exhibit A to the contract defines the Construction Manager's scope of work. O & M related services are called for in both the construction and postconstruction phases of the work. For all projects specified in the Construction Manager's contract, obligated services include Startup and Preparation (Task II-18); Training Programs (Task II-19); Equipment Manuals (Task II-20); and Startup, Shakedown, and Operational Demonstration (Task III-3). We recognize that not all Phase I projects are covered in the Construction Manager's contract. Absent from the scope are the notable projects of the Mission Valley Reclamation Plant, a Mission Gorge plant, a possible South Bay treatment plant, and the possible secondary upgrade of the Point Loma plant. Still, the fact that these projects are not now expressly covered by the Construction Manager's contract does not mean that it was never intended that they might be included later. This is especially true where several of the projects remain tentative at this time. Only one Construction Manager has so far been contracted, and thus it is not unreasonable to assume that the agreement might be amended to cover all projects in Phase I, including all O & M Services.

We therefore believe that all O & M Services may indeed be contracted by amendment with either the Program Manager or the Construction Manager and that no violence to Council Policy 300-7 would result. This conclusion is further supported by the simple logic that these two firms, by virtue of their existing contracts, will have developed the best overall understanding of the system of constructed facilities and therefore will be in the best position to provide O & M Services for the system.

The question is then reduced to which of the two firms is to be selected, and upon what basis. Here we agree with your proposition that

the two ought to compete for this work by making proposals, and that selection should be based primarily on technical qualifications and experience. Cost should thereafter be considered in the context of negotiations with the recommended firm, and if no reasonable accord can be reached on this point, then the other firm could be reapproached.

There is a concern, however, in consolidating all O & M Services into one contract when both of the existing contracts already contain elements of O & M. It appears that if all O & M Services are addressed in one contract, then the scope of work in one of the existing contracts would be reduced. Since the City would be already bound to pay each firm for some aspects of O & M, the agreement with the firm which is not successful in obtaining the comprehensive amendment would have to be renegotiated to prevent a breach. (In the case of the Construction Manager, the contract has not actually been awarded as of this date, and thus the elements of O & M might be suspended pending the outcome of the competition for the comprehensive O & M Services amendment.)

A final issue is the proposed duration of the O & M Services agreement, figured at this time to extend to the completion of Phase I in 2003. City Charter section 99 deals with the subject of "Continuing Contracts" and provides in part:

> No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds majority vote of the members elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.

The contract amendment for comprehensive O & M Services would therefore be limited to no more than five years unless a special ordinance is passed by a two-thirds Council vote. If the amendment is so limited, after the five years have passed the contract could be extended (again for no more than five years) by a simple majority vote of the Council.

Hopefully this response will assist you in determining how comprehensive O & M services can be contracted. We would be pleased to supply further information if you believe it necessary.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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