

MEMORANDUM OF LAW

DATE: July 6, 1992

TO: Dave Schlesinger, Director, Clean Water Program

FROM: City Attorney

SUBJECT: Local Preference in Federal Grants

The City of San Diego has received a \$40 million federal grant in Fiscal Year 1992 to upgrade the Metro Sewer System. (We would note that although the award of this grant currently is in question, the following analysis is relevant to any future grant awards administered under Title 40 of the Code of Federal Regulations.) Moreover, it is anticipated that the City will be receiving additional federal grants in future fiscal years for the Clean Water Program. Pursuant to Title 40, section 33.230 of the Code of Federal Regulations, under which these grants are administered, a grant "recipient shall conduct all procurement transactions in a manner that provides maximum open and free competition." Procurement practices which unduly restrict or eliminate competition, such as local bidder preference laws, therefore are prohibited. 40 C.F.R. Section 33.230(b)(4) (1991).

At present, the San Diego City Council is contemplating enacting a local preference policy. Specifically, the Council is considering placing a new Charter section on the November 1992 ballot for consideration by the electorate. The proposed Charter section (see attached Report to Council) permits the City to consider the adoption of a local business enterprise preference program by ordinance.

ANALYSIS

Given the foregoing, you requested our office to draft a legal memorandum concerning the impact of a City local preference policy on federal grants. Alternatively, the question may be stated as follows: Will the City of San Diego be required to comply with federal administrative regulations prohibiting local bidder preference policies in order to receive federal grant funds? The simple answer to this question is yes. Section 33.230 is a term or condition for receiving the grant monies. The City therefore is forced to choose between complying with the term or condition or rejecting the grant. Presumably, the

ordinance language implementing the proposed preference policy would include a provision which would allow for a waiver when faced with contravening federal regulations. Thus, acceptance of a grant with such a restrictive condition would not violate the City Charter or be in contravention of a City ordinance.

The next logical question is whether a federal regulation prohibiting a local preference policy is valid. Attached is a memorandum drafted by Legal Intern Paul Junge analyzing this issue. I have reviewed and approved his work. His analysis demonstrates that such a federal regulation is in fact valid.

CONCLUSION

Title 40, section 33.230(b)(4) of the Code of Federal Regulations prohibits a grant recipient from employing a local preference policy in its procurement practices. Such a term or condition in a federal grant is valid and enforceable. Thus, if The City of San Diego wishes to apply for federal grant monies which are administered under this or a similarly restrictive regulation, then it must comply with the terms and conditions of the regulation. Any City preference policy adopted by ordinance would be subordinate to such a regulation if the City wishes to receive the grant funds. We hope this information is helpful to you; should you have any questions, however, do not hesitate to contact our office.

JOHN W. WITT, City Attorney

By

Kelly J. Salt

Deputy City Attorney

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Attachments

cc Paul Junge

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