

MEMORANDUM OF LAW

DATE: August 17, 1992

TO: Laurie M. Schwaller, Assistant Purchasing Agent

FROM: City Attorney

SUBJECT: Belt Filter Press Bid No. B 3071/92

You contacted our office with regard to a protest you have received from Gierlich-Mitchell, Inc., one of nine bidders on bid No. B 3071/92 for the purchase and installation of four (4) sludge belt filter presses for use at Fiesta Island. According to Gierlich-Mitchell, the contract specifications should have required that a contractor/vendor have an "A" class license in order to bid on the contract. We have researched the issue and conclude that the contract may be awarded to a contractor/vendor who does not have an "A" class license.

ANALYSIS

California Business and Professions Code ("CBPC") section 7045 provides in relevant part:

This chapter does not apply to the sale or installation of any finished products, materials or articles of merchandise, which do not become a fixed part of the structure, nor shall it apply to a material supplier or manufacturer furnishing finished products, materials, or articles of merchandise who does not install or contract for the installation of those items
(Emphasis added.)

Whether the goods installed become a fixed part of the structure is a question of fact. *Walker v. Thornsberry*, 97 Cal. App. 3d 842, 847 (1979). In *Walker*, a manufacturer sold a metal prefabricated restroom to a general contractor. The manufacturer, not licensed as a contractor, agreed to furnish, assemble, and install the unit on a concrete foundation prepared by the general contractor. The unit was to be bolted to the concrete foundation.

In reviewing the facts of the case, the court concluded

that the manufacturer was not required to have a contractor's license to place the prefabricated structure on the site. The court noted that the manufacturer was not required to undertake the installation of the concrete foundation, rough plumbing, plumbing fixtures, stalls, etc. Rather, the manufacturer merely assembled the pieces and bolted the structure to the foundation. "Its contribution of labor to the finished restroom was at most minor and incidental." *Id.* at 848.

Similarly, the primary purpose of the proposed agreement with the City is the purchase of equipment. Installation of the equipment is merely an incidental part of contract. (See, attached City Attorney Memorandum of Law dated July 10, 1992.)

Additionally, a review of the facts clearly illustrates that the filter presses will not become a fixed part of the structure, i.e., a fixture. The term "fixture" is defined by statute as a "thing . . . which is . . . affixed to land when . . . permanently resting upon it, as in the case of buildings; . . . or permanently attached to what is . . . permanent" by any of several illustrative "means." California Civil Code ("CCC") section 660 (emphasis added).

In determining whether an article constitutes a fixture pursuant to CCC section 660, three criteria must be taken into consideration: "(1) the manner in which the item is annexed to the underlying realty; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention with which the annexation was made." *Security Data, Inc. v. County of Contra Costa*, 145 Cal. App. 3d 108, 117 (1983). "In making the determination in a particular case the element of intent is regarded as a crucial and overriding factor, with the other two criteria being considered only as subsidiary ingredients relevant to the determination of the intent." *Seatrains Terminals of California, Inc. v. County of Alameda*, 83 Cal. App. 3d 69, 75 (1978). The intention of the parties possessing the realty is controlling. *Id.* at 74.

In the instant case, the intention of the City is clear. The filter presses will not become a fixed part of the concrete pad at Fiesta Island. In fact, the California Coastal Commission has informed the City that it must relocate its sludge drying processing facilities off of Fiesta Island.

The City is currently in the process of locating a new site for the facilities; the filter presses will be moved in the near future to this location. Moreover, we would note that the City's relocation plans are integrally tied to a United States District Court order mandating that the City come into compliance with the Clean Water Act.

CONCLUSION

Any contractor/vendor awarded the contract on Bid No. B 3071/92 does not have to be a licensed contractor. The filter presses will be bolted to a concrete pad which has already been poured and prepared by City forces. Such installation does not make the equipment a fixed part of the concrete pad. Additionally, the City does not intend that the equipment become a fixture of the property; the equipment will be moved in the near future when the sludge drying facilities are relocated off of Fiesta Island.

JOHN W. WITT, City Attorney

By

Kelly J. Salt

Deputy City Attorney

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Attachment

cc Alan Langworthy

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