

MEMORANDUM OF LAW

DATE: November 16, 1993

TO: Dr. George Penn, President
Southeastern Economic Development Corporation

FROM: City Attorney

SUBJECT: Redevelopment Agency's Responsibility for Design
and Construction of the Alpha Street Realignment

By memorandum dated November 9, 1993, you requested a legal opinion as to whether the Southeastern Economic Development Corporation ("SEDC") acting as agent of the Redevelopment Agency of The City of San Diego (the "Agency"), properly issued a Request for Qualifications ("RFQ") for design work needed to be done for the construction of the Alpha Street realignment. For the reasons set forth below, it appears that SEDC took the correct action.

Statement of Facts

According to your Memorandum and conversations with you, Carolyn Smith, and Bernard Johnson of your staff, the following facts have been related to me.

On May 3, 1993, the Agency entered into an amended Disposition and Development Agreement ("DDA") with American Stores Properties, Inc. ("ASPI"), which involved, among other things, the construction of a Lucky Supermarket. This construction necessitated the realignment of Alpha Street which is in the public right-of-way.

The DDA, in Attachment No. 4, pages 11 of 13 and 12 of 13, outlines the Agency's responsibilities for the realignment.

Section III.B. reads in pertinent part:

III. AGENCY RESPONSIBILITIES

....

B. Off-Site Public
Improvements and Utilities

....

2. Installation
of curbs, gutters, pedestrian ramps
and sidewalks (all as and if
required) along Alpha Street and
other adjacent streets abutting the

Site including heavy paving of Alpha Street and 43rd Street, and landscape island features, all in accordance with City ordinances.

3. Installation of appropriate street lighting and street trees within the public rights of way on the perimeter of the site and the installation of a traffic signal at 43rd and Alpha Streets.

Notwithstanding anything herein to the contrary, the Agency's total financial commitment with respect to its obligations pursuant to this Section IIIB shall in no event exceed the sum of One Million Three Hundred Thousand Dollars (\$1,300,000).

The one million three hundred thousand dollars (\$1,300,000) was to come from land sale proceeds.

SEDC had its engineer draw up design specifications for the Alpha Street realignment. Those specifications were then submitted to ASPI's engineering consultant, who further refined them. This was in accordance with the DDA, Attachment No. 4, Page 12 of 13 which said:

Drawings, plans and related documents for off-site improvements with respect to the Site shall be submitted to the Developer for review and approval and coordination with the Developer improvements. All such improvements shall be constructed in accordance with standards and specifications prescribed by The City of San Diego.

SEDC then issued a RFQ on September 15, 1993, for the design work on the Alpha Street realignment. ASPI was aware of SEDC's actions leading up to the issuance of the RFQ.

Issue

ASPI is now contending that it should be the entity responsible for the design and construction of the realignment, rather than having the project go out for public bid. According to your November 9, 1993 Memorandum, ASPI is making this contention (at least in part), because its engineering consultant was involved in the "preparation of the conceptual work which the Agency is using to bid out the design and eventual construction

of Alpha Street."

Analysis

The language of the DDA is clear on its face that the Agency has responsibility for off-site public improvements, such as the alignment of Alpha Street, up to a cost of one million three hundred thousand dollars (\$1,300,000). Thus, SEDC, on behalf of the Agency, was responsible for deciding the process by which the work was to be done.

However, SEDC was limited in its options. The realignment of Alpha Street is clearly a public project, in that it is a project realigning a public street, utilizing public dollars.

The Agency is a governmental entity created pursuant to the California Community Redevelopment Law (California Health and Safety Code section 33000 et seq.) "There is in each community a public body, corporate and politic, known as the redevelopment agency of the community." 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. As such, it is a "public entity" as used in the California Public Contract Code section 1100, and comes under its provisions.

The choosing of an engineering consultant for the design work by the Agency must be done "on the basis of demonstrated competence and on the professional qualifications necessary for satisfactory performance of the services required." See Government Code section 4526. While the code section does not mandate a particular selection process for local agencies such as the Agency, it does stress the high degree of competence and experience that be shown prior to a contract being awarded. Thus, it is standard Agency process to issue RFQs for any design work to ensure the standards of Government Code section 4526 are met.

As for construction work, the Agency has even less discretion. The California Public Contract Code states in part: "Any work of . . . construction undertaken by the agency shall be done by contract after competitive bids if the cost of such work exceeds the amount specified in Section 37902 of the Government Code, as that section presently exists or may be hereafter amended." Public Contract Code section 20688.2.

In 1982, Government Code section 37902 was repealed by Stats. 1982, c. 465, p. 1914, Section 8, and incorporated into the Public Contract Code as Section 20162. Section 20162 says that when a public contract exceeds five thousand dollars (\$5,000), "it shall be contracted for and let to the lowest responsible bidder after notice."

Assuming the realignment of Alpha Street exceeds five thousand dollars, which seems reasonable since the Agency budgeted one million three hundred thousand dollars for it, the Agency is not in a position legally to have ASPI do the realignment without going out for bid, and seeking the "lowest responsible bidder."

Conclusion

SEDC was correct in its approach to issuing the Request for Qualifications, and in its plan to then issue a Request for Proposals, for the realignment of Alpha Street. This conclusion is based on:

1. This was the process contemplated in the amended Disposition and Development Agreement which clearly stated the Redevelopment Agency would be responsible for off-site improvements.
2. It is standard Agency practice to implement the requirements of Government Code section 4526 by issuing Requests for Qualifications for design services of the type needed for the realignment work.
3. Public Contract Code section 20688.2 requires redevelopment agencies to go out to bid for construction projects over five thousand dollars (\$5,000).

Please call me if you have any further questions.

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By

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