MEMORANDUM OF LAW

DATE: February 2, 1993

TO: Cruz Gonzales, Risk Management Director and
F. D. Schlesinger, Clean Water Program Director

FROM: City Attorney

SUBJECT: "Wrap-Up" Insurance

BACKGROUND

This responds to your questions concerning the prospect of obtaining a comprehensive "wrap-up" owner controlled insurance policy for Clean Water Program construction projects. With this approach, the numerous separate projects of the Clean Water Program would be insured for general liability by a single policy held by The City of San Diego, hence the title "wrap-up" policy. Contractor risks would be required to be insured by the "wrap-up" policy, so in essence the City would be mandating that contractors use the City selected insurer. As your questions recognize, the "wrap-up" concept of insuring construction projects differs from the more traditional arrangement where the contractor for each separate project obtains coverage for that project through his or her own insurer. Upon this background, you raise two questions:

QUESTIONS

1. Is the purchase of such a policy permitted by Government Code section 4420?

2. If not, is an amendment to the Code necessary as was done in the 1981 amendment to the section for the Bay Area Rapid Transit ("B.A.R.T.") District?

ANSWERS

1. No. Government Code section 4420 generally prohibits public agencies from requiring contractors to procure surety bonds or insurance contracts specified in a public works contract, and it further generally prohibits the public agency from obtaining insurance which the contractors could obtain themselves.

2. Yes. An amendment similar to the one adopted for B.A.R.T. would provide an exception to the rule expressed in the answer to Question 1.

ANALYSIS

Government Code section 4420 provides in relevant part:

> No officer or employee of this state, or of any public agency or of any public authority, and no person acting or purporting to act on behalf of such officer, employee, or public agency or authority, except a public agency or authority created pursuant to agreement or compact with another state, shall, with respect to any public building or construction contract which is about to be or which has been competitively bid, require the bidder to make application to, or furnish financial data to, or to obtain or procure any surety bond or contact of insurance specified in connection with such contract, or specified by any law, ordinance, or regulation, from, a particular surety or insurance company, agent or broker. No such officer or employee, or person, firm, or corporation acting or purporting to act on behalf of such officer or employee, shall negotiate, make application for, obtain, or procure any such surety bond or contract of insurance (except contracts of insurance for builder's risk or owner's protective liability) which can be obtained or procured by the bidder, contractor, or subcontractor.

This statute certainly would apply to the "wrap-up" type of policy just as it would apply to contracts of insurance for individual projects. The plain purpose of Section 4420 is to prevent that which is emphasized by the chapter title: "Unfair and Coercive Insurance Requirements." In short, it is intended to prevent public agencies from dictating to contractors the use of specific insurers. Therefore, in answer to your first question, it is clear that a "wrap-up" policy could not lawfully be imposed on Clean Water Program projects at this time.

Turning to the next question, an amendment to Section 4420 would indeed be necessary to allow use of a "wrap-up" policy for the Clean Water Program. Section 4420 has been amended several times (1981, 1984, 1989, 1992) to provide narrow exceptions, and

these exceptions have been consolidated in the third paragraph of the statute, which now reads:

> This chapter shall not apply to the construction of any exclusive public mass transit guideway project in any county with a population exceeding 6,000,000, or in the County of Santa Clara or the City and County of San Francisco, to any exclusive mass transit guideway project undertaken by either the San Francisco Bay Area Rapid Transit District or the Sacramento Regional Transit District, or to any airport expansion project undertaken at the San Francisco International Airport.

As is clear from the language of the exceptions, the variances have so far been confined to projects of large transportation programs. Specifically, these are San Francisco and Santa Clara's B.A.R.T. rail system, Sacramento's Transit District, and the San Francisco Airport Authority. Generally, an exception would exist for mass transit programs in any county with more than 6 million inhabitants. All of these exceptions seem to apply to multi-project programs, however, so we see no logical reason why an exception might not also be extended by the Legislature to a large wastewater treatment and water reclamation program. Of course, the City would require the assistance of a state legislator to introduce and carry a bill of amendment. We would be pleased to assist in the drafting of a proposed amendment if given direction regarding scope of application.

JOHN W. WITT, City Attorney
By
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cc Julian Johnson
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