MEMORANDUM OF LAW

DATE: March 17, 1993

TO: Milon Mills, Water Utilities Director
F. D. Schlesinger, Clean Water Program Director

FROM: City Attorney

SUBJECT: Surety Requirements for Public Works Contracts; Assembly Bill 2872

You have each received a letter dated January 19, 1993 from Mr. Jim Casey of the Construction Industry Federation concerning the passage last year of Assembly Bill 2872 ("AB 2872"). Mr. Casey states that this legislation "effectively precludes state and local entities from further qualifying Sureties beyond their merely being licensed by the Insurance Commissioner." You have requested our opinion on this subject.

AB 2872 is now codified in the Code of Civil Procedure, which provides:

> This section applies to a bond executed, filed, posted, furnished, or otherwise given as security pursuant to any statute of this state or any law or ordinance of a public agency as defined in Section 4420 of the Government Code. No state or local public entity shall require an admitted surety insurer to comply with any requirements other than those in Section 995.660 whenever an objection is made to the sufficiency of the admitted surety insurer on the bond or if the bond is required to be approved.

California Code of Civil Procedure Section 995.670.

In effect, this language is intended to leave the California Department of Insurance with the exclusive authority to determine the acceptability of sureties on local public works contracts. That is, it purports to provide that if a surety is admitted, i.e. regulated by the Department of Insurance, the

local entity must accept that surety on an otherwise low responsible contract bid, unless a specific objection against that surety has been lodged with the Department of Insurance.

This mandate is at odds with the City's existing contract specifications, which generally are based on the Standard Specifications for Public Works Construction ("Green Book"), Am. Pub. Works Ass'n (1991), Regional Supp. Amends. (April 1992). San Diego City Charter ("City Charter") section 94 requires all public works in excess of a cost determined by ordinance to be performed under written contract. The terms of such written contracts are established by the Council of The City of San Diego ("Council") when it approves advertisement for bids of each public works project. Although specific terms may vary according to each project, the Green Book's general terms are typically incorporated by reference in every written public works contract approved by the Council. This incorporation by reference is a prerogative of the Council in establishing the terms of the written contracts as required by the City Charter. The Council also generally has authority to deviate from Green Book provisions if it desires. Thus, differences in certain provisions exist in a regional supplement, in the City's own supplement, and even in specific individual contract documents. Generally, however, some version of the Green Book is incorporated for administrative uniformity and simplicity. With respect to the matter of surety bonds, contracts approved by the Council generally reference the Regional Supplement to the Green Book.

The Green Book Supplement presently provides in Section 2-4 that sureties must be rated Class A or better by the A.M. Best rating agency, or must be listed in the U.S. Department of the Treasury Circular 570, which is the federal government's list of acceptable sureties. Obviously, not all sureties admitted in California meet both or either of these requirements, so the asserted effect of AB 2872 (according to Mr. Casey) is that admitted sureties must be accepted regardless of those requirements.

In analyzing this assertion, reference must be made to the "law or ordinance of a public agency" which requires sureties on public contracts. In the case of The City of San Diego, this law is City Charter section 94. The fact that the surety requirement is based in the City Charter raises a concern for the doctrine of "municipal affairs." Under California Constitution Article XI, Section 5, a charter city has autonomous authority over its "municipal affairs." It has been held that the mode of contracting for City improvements is a municipal affair, and with respect to surety requirements, it has specifically been held

that a state statutory requirement for a material and labor bond for state, municipal and other public work is inapplicable to a city whose charter provides a complete scheme for letting such contracts and the terms thereof. Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 232-234 (1916); Williams v. City of Vallejo, 36 Cal. App. 133, 139-140 (1918). See also the attached Memorandum of Law by Deputy City Attorney John K. Riess dated January 21, 1982, which ironically was addressed to Mr. Casey at a time when he was City Engineer.

Therefore, the requirements of AB 2872 are not necessarily applicable to contracts involving the City's municipal affairs. Whether a subject matter is of municipal or statewide concern must be judicially determined but no precise definition of the term "municipal affairs" has been formulated by the courts. Bishop v. City of San Jose, 1 Cal. 3d 56, 61-62 (1969). Still, there are criteria which are helpful for determining what matters are municipal affairs. Generally, these are facts which are indicative of the City's exclusive interest: "Matters of intra-corporate structure and process designed to make an institution function effectively, responsively and responsibly should generally be considered a municipal affair." Sato, "Municipal Affairs" in California, 60 Cal. L. Rev. 1055, 1077 (1972). Conversely, evidence of extrajurisdictional interest would indicate that a matter is not a municipal affair, but is one of statewide concern.

Practically, the determination will turn on whether the contract in question has any element of state or federal funding, or whether any other governmental entity is either directly contributing funds or is directly interested in the project. Also, contracts funded in whole or part by Proposition A gasoline tax money are not municipal affairs due to the regional nature of the tax. On the other hand, those contracts which involve projects in which the City is exclusively interested are municipal affairs. This exclusive interest may be demonstrated if the City is funding the entire contract and the project in question does not have any significant importance to other jurisdictions.

On this point, we believe that AB 2872 will certainly apply to most projects of the Clean Water Program, because that program is truly regional in scope. Many other local agencies in the region are directly interested in Clean Water Program projects. Thus, contracts of the Clean Water Program must comply with AB 2872 by specifying that any admitted surety will be acceptable.

For the Water Utility, it is our belief that many projects will remain municipal affairs, and the requirements of AB 2872

will not be mandatory. Unless there is some facet of a Water Utility contract which would render it a matter of statewide concern, no change to the existing Green Book specification will be necessary.

JOHN W. WITT, City Attorney
By
Frederick M. Ortlieb
Deputy City Attorney

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Attachment
cc: Al Rechany, Clean Water Program Contracts
Carol Frederick, Eng. and Dev. Contracts Processing
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