

MEMORANDUM OF LAW

DATE: April 21, 1994

TO: Councilmember Ron Roberts

FROM: City Attorney

SUBJECT: Pre-qualification of Bidders

You have indicated that The City of Santa Ana is pre-qualifying bidders for city projects and ask whether The City of San Diego could adopt a similar pre-qualification program.

SUMMARY

Under the San Diego City Charter and established case law, The City of San Diego is required to award construction contracts to the "lowest responsible bidder." The City of San Diego may establish a pre-qualifying bid process. However, a pre-qualifying bid process would require the establishment of a hearing process to allow a prospective bidder to challenge any determination a bidder is not responsible to perform the contract in question.

ANALYSIS

The City of Santa Ana is a chartered city. City of Santa Ana Charter section 421 provides in pertinent part:

Every contract involving an expenditure of more than ten thousand dollars (\$10,000.00) for materials, supplies, labor, equipment, other valuable consideration, or for public works construction (as hereinafter defined) shall be made by the city council with the lowest and best bidder . . . . (Emphasis added.)

In a conversation with Santa Ana City Attorney Ed Cooper, he explained the phrase in the Santa Ana Charter "lowest and best bidder" is comparable to the "lowest responsible bidder" language in other charters. Santa Ana has also adopted a pre-qualification bid procedure.

Our office has previously addressed the meaning of "lowest responsible bidder" as set forth in the San Diego City Charter section 94. Attached as Exhibit A to this memorandum of law is a report to the Honorable Mayor and City Council, dated August 28,

1992, which we believe accurately sets forth the state of the law and thoroughly analyzes the meaning of "lowest responsible bidder."

The Court in *Boydston v. Napa Sanitation District*, 222 Cal. App. 3d 1362, 1368-1369 (1990) summed up the definition of responsible bidder:

In the context of "responsible bidder," the term "responsible" refers not only to the attribute of trustworthiness, but also to the quality, fitness and capacity of the bidder to perform the proposed agreement satisfactorily. (*City of Inglewood, supra*, 7 Cal.3d at p. 867; 10 *McQuillen, Municipal Corporations*, Section 29.73.05.) When a statute requires that an award be made to the lowest (or highest) responsible bidder, it must be awarded accordingly unless that bidder is found not responsible, i.e., not qualified to perform the particular work under consideration. Although public bodies have discretion to determine which bidders are responsible, they may not, if they determine more than one bidder is responsible, make the award on the basis of relative superiority. (*City of Inglewood, supra*, at p. 867.) Before a contract may be awarded to one other than the lowest (or highest) bidder, the public body must (1) notify that bidder of any evidence reflecting upon the bidder's responsibility received from others or adduced as a result of independent investigation, (2) afford the bidder an opportunity to rebut such adverse evidence, and (3) permit the bidder to present evidence of qualification. (*Id.*, at p. 871; see also *Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1341 241 Cal.Rptr. 379.)

In sum, to find a bidder not to be responsible requires a finding

the bidder is not qualified to perform the work under consideration.

#### CONCLUSION

The City of San Diego may establish a procedure to first determine whether a bidder is "responsible" before determining whether a bidder is "lowest." Any procedure would require notification to all disqualified bidders of evidence reflecting on their lack of "responsibility" to perform the work under consideration, and affording those bidders an opportunity to rebut such evidence, and permitting the bidders to present evidence of qualifications. The procedure currently in place obviates the need for a due process hearing on "responsibility" unless the bidder is "lowest."

JOHN W. WITT, City Attorney

By

Kenneth K. So

Chief Deputy City Attorney

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Attachment-Exhibit A

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