

MEMORANDUM OF LAW

DATE: August 11, 1994

TO: Mike Faramarzi, Metropolitan Wastewater Department

FROM: City Attorney

SUBJECT: Special Qualification Requirements for Revegetation
Contract Regarding Pump Station 65 and North Metro
Interceptor Sewer Projects

You have sought our views as to whether special qualification provisions may be included in bid specifications for the two (2) projects referenced in the caption. We have previously outlined the law with respect to special experiential requirements in our August 28, 1992 Report to Mayor and Council which we reaffirm and attach for reference. In general we found that a random experience requirement is a deterrent to full competition which is a hallmark of public contracts. However, we were quick to note that this general rule had exceptions where the work was of "a rare and special nature" that permitted experience to bear on responsibility.

Within this context, we answer your inquiries in the order listed and with supporting reasons for each.

1. REVEGETATION CONTRACT AT PUMP STATION 65

This office is very familiar with the stringent revegetation requirement imposed on the City as a result of Army Corps of Engineers Permit No. 93-745 DZ and our assistance in avoiding duplicate bond costs. Moreover during the course of our review, several indications were received to the effect that there are few, if any, instances where the type of mitigation required has been successfully accomplished in California and that the success of this mitigation program would be difficult at best to attain.

To that end, the department desires to require the following qualifications in the specification: "The Contractor shall hold a valid California Contractors License, Class C-27, and shall demonstrate native habitat restoration experience in at least one previous salt marsh revegetation project in California."

We find this qualification acceptable. It does not set an arbitrary experience level but rather requires a specified

license for competency and one prior project to demonstrate familiarity with the specified revegetation required. We think that under the circumstances of the contract in question, such a qualification meets both the letter and intent of responsible public bidding. As articulated in *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App. 2d 803, 821 (1962), such a qualification is "sufficiently detailed, definite and precise" to allow competitive bidding upon a common standard. While establishing that some experience is prerequisite to bidding, the degree of experience required is not so great as to prevent potentially responsible parties from bidding.

2. NORTH METRO INTERCEPTOR PROJECT

In a similar request, you have forwarded six (6) areas of special qualification urged by Woodward-Clyde in their letter of August 1, 1994 dealing with: 1. stone column installation; 2. shaft excavation and support; 3. soft ground tunneling; 4. chemical grouting; 5. pipe jacking; and 6. instrumentation and monitoring.

To the extent that several of these "special qualifications" deal with arbitrary levels of years of experience and arbitrary number of completed projects, they cannot be supported since they serve to reduce competition by precluding otherwise responsible bidders. Hence, the Section 02210 requirement of "5 years experience . . . documenting 15 successful projects" (Woodward-Clyde letter, page 2 et seq.) cannot be supported since it would operate to exclude many licensed contractors without any showing why the successful completion of one project is any less responsible than the completion of 15. Similar flaws are found in Section 02295 ("minimum of five years experience"), Section 02316 ("at least 5 years experience"), Section 02345 ("at least three years experience"), and Section 02355 ("minimum of 5 years experience"). As to each of these "experience" levels, each would operate to limit competition without any justification of why a licensed contractor with fewer years of experience would not be equally as responsible.

Other aspects of the qualifications shift from minimum years of experience to minimum numbers of prior projects. Again to the extent that arbitrary limits such as fifteen, five or three are required without any showing of how this bears on responsibility, such arbitrary limits cannot be supported. However, the six (6) areas listed deal with areas (such as soft ground tunneling) that are highly sensitive to difficulty, specialized risk, and health and safety. In dealing with such specialized tasks, we believe that requiring the experience level of at least one prior project justifiably bears on the issue of

responsibility. Requiring at least one prior project in these areas would limit competition somewhat but, given the specialized nature of the task, can fairly be said to be directly indicative of responsibility.

I trust this responds to the two (2) project inquiries and gives you sufficient direction upon which to proceed with the bid specifications.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:lc:mb:151(x043.2)

Attachment:RC-92-52

ML-94-69

TOP

TOP