

MEMORANDUM OF LAW

DATE: March 2, 1995

TO: Ernie Anderson, Assistant Director, Financial Management
Department

FROM: City Attorney

SUBJECT: Sole Source Procurement

This replies to your request for legal perspective concerning the subject of sole source procurement. Specifically, you asked about a January 30, 1995 memorandum signed by the City Manager (copy attached) which delegates authority to the Metropolitan Wastewater Department Director to certify "sole source" procurements up to a value of \$250,000.

The City Manager does have the authority to certify sole source procurements. San Diego Municipal Code section 22.0504. Further, delegation of this authority to a department head is lawful. San Diego City Charter section 28 provides in relevant part that "all other administrative powers conferred by the laws of the State upon any municipal official shall be exercised by the Manager or persons designated by him." (emphasis added.) Thus, no legal problem exists in the delegation of the sole source procurement certification authority to a department head.

You are right to observe, however, that these certifications call for the use of utmost discretion due to the absence of competition. Favoritism and excessive cost are but two of the possible evils that may result from the elimination of competition. Still, there will be instances where for legitimate reasons only one product will suffice, and where the decision to have only that one product will be based strictly on functional and practical needs. The Municipal Code authorizes the Manager to employ discretion in deciding whether the interests of the public will be best served by forgoing competition in certain procurements. With the delegation of this discretion, the department head assumes the responsibility it entails.

You point out that San Diego Municipal Code section 22.0504 provides that "the Purchasing Agent shall not be required to advertise for sole source procurement provided certification to this effect is approved by the City Manager." (emphasis added.) The question you imply is whether the Purchasing Agent would be precluded from advertising a procurement where a sole source has been certified by the Manager or his designee. The answer is affirmative; to conclude otherwise would strip the Manager of the discretionary authority clearly intended by the ordinance and would allow the Purchasing Agent to effectively veto the

Manager. This would be an unreasonable construction of the ordinance.

It is worth noting that provision for sole source procurement exists not only under San Diego's Charter and Municipal Code, but in general law as well. See Public Contract Code section 10301. Parallel with your concern, this general law has also been the subject of criticism. It has been perceived, rightly or wrongly, as a "loophole" in public competitive bidding laws. See attached article: Circumventing California's Competitive Bidding Laws Through Sole-Source Bidding: Time for a Change, Jill A. Fordyce, Public Law Journal, Vol. 18, No. 3 at pp. 3, 4 (1995). This article suggests that legislative reforms should be enacted to allow access by other potential bidders to challenge sole source procurements. However, this is only criticism, and "sole source" procurements are still legal within bounds of managerial discretion. To readily show that discretion is being properly used, and not abused, sound and legitimate reasons should continue to be given in support of any sole source procurement.

A further point should be made regarding a distinction between procurement and public work contracts. The sole source provisions discussed above pertain to procurement contracts only, pursuant to the ordinance adopted under Charter sections 28 and 35. On the other hand, public work contracts come under Charter section 94; these are defined as contracts for the "construction, reconstruction, or repair of public buildings, streets, utilities, and other public works" Certain provisions of state general law apply to San Diego's public work contracts, and without question to those of the Metropolitan Wastewater Department, due to its regional profile. Of significance is Public Contract Code section 3400, which provides that public work specifications cannot "limit the bidding, directly or indirectly, to any one specific concern . . . unless the specification lists at least two brands or trade names of comparable quality or utility and is followed by the words 'or equal' so that bidders may furnish any equal material, product, thing, or service." This statute contains a limited exception for "those instances where the product is designated to match others in use on a particular public improvement either completed or in the course of completion, calling for a designated material, product, thing, or service by specific brand or trade name." The statute also allows that the agency may list only one brand name "in those cases involving a unique or novel product application required to be used in the public interest, or where only one brand or trade name is known" to the agency. In such cases, however, the specifications must provide the bidder opportunity to propose "an equal" with supporting data within thirty-five (35) days from contract award. Generally then, specification of sole sources in public work contracts is more restrictive than in procurement contracts.

Hopefully this will resolve questions your department and the Purchasing Agent may have with respect to "sole source" procurements.

JOHN W. WITT, City Attorney

By

Frederick M. Ortlieb

Deputy City Attorney

FMO:mb:151(x043.2)

Attachments

cc Linda K. Baldwin, Purchasing Agent

William Hanley III, Deputy MWWD Director

Stuart H. Swett, Senior Chief Deputy City Attorney

ML-95-16