

MEMORANDUM OF LAW

DATE: April 11, 1995

TO: Teri Juybari, Senior Contract Specialist, Metropolitan
Wastewater Department

FROM: City Attorney

SUBJECT: Drug Testing of Contractor and Subcontractor Personnel

You have requested an analysis of the following questions raised in connection with the Owner Controlled Insurance Program ("OCIP") of the Metropolitan Wastewater Department:

1. Does the City have the right to request post-accident drug testing of contractor's personnel?
2. Is performing a drug test an infringement of personal rights?
3. What are the requirements for post-accident drug testing of union and nonunion employees?
4. What recourse does the City have if a contractor's employee refuses to submit to a drug test?

ANALYSIS

A. Independent Contractors

In determining whether employees may lawfully be subject to drug testing under any of various circumstances, it is important to first have a clear understanding of whose employees are in issue. Your questions indicate that the issue is whether the City may require testing not of its own employees, but of a contractor's personnel. This is a significant and dispositive fact for the analysis of all your questions.

San Diego City Charter section 94 provides that all public work costing in excess of a sum established by the City Council shall be done by written contract.F

Section 94 does provide an exception for work to be performed by City Forces if the cost does not exceed an amount ordained by the Council and the City Manager certifies that City Forces can do the work more economically. This situation is not addressed here because the OCIP is not concerned with City Forces.

Generally, there are certain advantages and protections for the City in having its public work performed by independent contractors, but there are also limitations on the degree of

control the City has over operations of the contractor.

The term "independent contractor" is defined by statute as "any person who renders service for a specified recompense for a specified result under the control of his principal as to the result of the work only, and not as to the means by which that result is accomplished." California Labor Code section 3353. An independent contractor is one who renders service in the course of an independent employment or occupation. He follows his employer's desires only in the results of the work, and not in the means whereby it is to be accomplished. *Gerrard v. Industrial Accident Commission*, 17 Cal. 2d 411 (1941).

When considering questions about employee drug testing, it is important to keep this distinction in mind. The contractor's employees are not the City's employees, but rather those of an independent contractor. Generally the City is not liable for the negligence of the employees of its independent contractors (*Caudell v. East Bay Municipal Utility District*, 165 Cal. App. 3d 1, 5 (1985); *West v. Atkinson Construction Co.*, 251 Cal. App. 2d 296, 299 (1967)). Independent contractors are thus solely responsible for the safety of their employees, and since drug testing for construction work purposes is principally a safety related concern, authority and control with respect to this subject ought to remain with the contractor.

B. The Drug Free Workplace Act

This does not mean, however, that the City cannot by means of contractual provisions require the contractor to take measures to control drugs in the workplace. In fact, the City has incorporated in all of its contracts the requirements of the Drug Free Workplace Act of 1988, 41 U.S.C. Sections 701 et seq. This federal legislation and the Office of Management and Budget (Treasury Department) regulations adopted under its authority require federal grantees and contractors to certify that they will provide a drug free workplace. If a contractor makes a false certification or violates the certification, that contractor may be suspended, terminated, or debarred. The Environmental Protection Agency has adopted these regulations at 40 C.F.R. Part 32, Appendix C, and these would generally pertain to OCIP insured Metropolitan Wastewater Department contracts in any instance where EPA grants are funding a project. (A copy of the EPA certification form is attached.)

Notably, however, the Drug Free Workplace Act and its certification regulations do not mandate any contractor drug testing program, nor do they even suggest such a program. The regulations are silent on the subject of drug testing and leave the decision whether to initiate a testing policy to the contractor's discretion.

This comports with the general principle of independent contracting discussed above. The public contractee may dictate the result (a drug free workplace), but must generally leave the means to that result to the contractor (i.e., whether and upon what terms to

implement policies regarding testing). The fact that the federal regulations defer to the independent contractor on this subject suggests that the federal government itself, at least in its role as a grantor to public contractees, is cautious about intervening in the relationship between contractors and their employees. We recommend that the same deference should be the rule with regard to City contracts, as is the present practice by incorporation of the Drug Free Workplace certification requirements.

JOHN W. WITT, City Attorney

By

Frederick M. Ortlieb

Deputy City Attorney

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Attachment

ML-95-26