

MEMORANDUM OF LAW

DATE: August 15, 1995

TO: William C. Hanley, III, Deputy Director, Metropolitan
Wastewater Department, Contract Management Division

FROM: City Attorney

SUBJECT: Waiver of Liquidated Damages -- South Metro Interceptor
Project -- Rondeau Bay Construction Company

You have requested legal advice on a question which has arisen from the performance of the South Metro Interceptor Rehabilitation Project. The issue concerns the disposition of \$26,500 in liquidated damages assessed against the contractor, Rondeau Bay Construction Company ("RBC") for untimely completion of the contract work. RBC has requested that these damages be reduced or waived entirely, based on a number of considerations which are set forth in full in the attached correspondence from RBC dated June 26, 1995 (addressed to you) and July 15, 1995 (addressed to the offices of Councilmembers Stevens and Vargas). In summary, these are the pertinent facts:

1. Section 6-9 of the contract provides that "(f)or each consecutive calendar day in excess of the time specified for completion of the work, the contractor shall pay to the agency, or have withheld from monies due, the sum of \$500 per day.
2. RBC completed the work 53 days beyond the specified completion date, and thus has been assessed \$26,500 in liquidated damages.
3. RBC does not dispute the amount of liquidated damages assessed as a result of its delayed completion of work. (Letter of July 15)
4. RBC requests relief from the assessment of liquidated damages for the following asserted reasons:
 - a) RBC worked with "community based organizations" in recruiting workers for this specialty sewer rehabilitation work.
 - b) RBC trained many local workers for the project. 90% of the workers were recruited locally, and 75% were minorities.
 - c) Some of the local workers will continue to be employed by RBC on jobs in other cities,

- and perhaps future jobs in San Diego as well.
- d) The recruitment and training of workers resulted in delays due to the laborers' inexperience with a specialized process. There was a high personnel turnover; a lack of supervisors fluent in Spanish; a reluctance of laborers to work in the sewer, which re-sulted in numerous employees calling in sick; and there was a slow "learning curve" in general.
 - e) Work hours from midnight to 5:00 a.m. were unusual and caused labor productivity problems.
5. RBC's intent in requesting a reduction in the liquidated damages would be to invest such amounts as may be waived and paid by the City "directly into the community" by continuing the training programs. RBC desires to maintain a business presence in San Diego and will continue its training programs in cooperation with local labor unions and minority contractor groups.
 6. RBC believes that continuation of the local training programs for its specialized sewer rehabilitation process will make it more competitive in future San Diego bids.

ANALYSIS

RBC's intentions and past efforts with respect to the training programs with local unions and minority contractor organizations are laudable and consistent with the City's policy objectives. However, RBC's cooperation and effort in fostering local and minority contract participation does not provide a legal basis for relief from liquidated damages pursuant to the terms of the contract. Since there is no contractual basis to support RBC's claim, an issue arises whether forbearance in assessing the liquidated damages would amount to a gift of public funds.

San Diego City Charter section 93 provides in relevant part that "the credit of the City shall not be given or loaned to or in the aid of any individual, association, or corporation. . . ." This provision is consistent with California Constitution Article 16, section 6, the relevant part of which reads:

The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise,

or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever.

Although the constitutional provision does not apply to charter cities like San Diego (see *Tevis v. City and County of San Francisco*, 43 Cal. 2d 190, 197 (1954)), the language and intent of the provision in Charter section 93 is the same, so decisions regarding the former are applicable to the present question.

One of the earliest cases articulating the prohibition against the gift of public funds is *Conlin v. Board of Supervisors*, 99 Cal. 17 (1893), which still illustrates the general rule very well. *Conlin* involved facts where the state legislature had passed a special act which authorized and directed the Board of Supervisors for the City and County of San Francisco to pay \$54,015.37 to a contractor named Conlin for certain street work performed and for which Conlin had "not been able to obtain compensation, according to the mode and procedure in such cases made and provided by statute...." Stated differently, the legislature had passed an act requiring San Francisco to pay a contractor who otherwise had no legal right to payment. In holding the act unconstitutional, the court wrote:

The "gift" which the legislature is prohibited from making is not limited to a mere voluntary transfer of personal property without consideration, which the Civil Code, section 1146, gives as a definition of gift; but the term, as used in the constitution, includes all appropriations of public money for which there is no authority or enforceable claim, or which rest upon some moral or equitable obligation, which in the mind of a generous or even a just individual, dealing with his own money, might prompt him to recognize as worthy of some reward All those moral considerations or demands resting merely upon some equitable consideration or idea of justice, which in an individual acting in his own right would be upheld, are insufficient as a basis for making an appropriation of public money. An appropriation of money by the legislature

for the relief of one who has no legal claim therefor must be regarded as a gift within the meaning of that term, . . . if the motive does not rest upon a valid consideration.

Conlin, 99 Cal. at 21-22 (emphasis added)

This statement of the general rule appears to bear on the present case, but as often occurs with general rules, an exception may apply. In this case, we should also consider the effect of later decisions which have further defined the term "gift."

It is well settled that, in determining whether an appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be used for a "public" or a "pri-vate" purpose. If they are for a "public purpose," they are not a gift (within the meaning of the Constitution or Charter).

Paramount Unified School District v. Teachers Association of Paramount, 26 Cal. App. 4th 1371, 1388 (1994); see also City of Oakland v. Garrison, 194 Cal. 298, 302 (1924).

The determination of what constitutes a public purpose is primarily a matter for legislative discretion, which will not be disturbed by the courts so long as it has a reasonable basis. Kizziah v. Department of Transportation, 121 Cal. App. 3d 11, 22 (1981).

Applying the foregoing to RBC's situation, it is clear that no legal basis for relief lies in the fact that RBC suffered efficiency problems as a result of having difficulties in recruiting, training, communicating with, managing, moderating, and retaining its employees. RBC submitted a bid knowing the nature and magnitude of the work and the effort that would be required to complete it in the contract time allowed. The reasons given by RBC regarding its loss of productivity simply do not entitle it to legal relief from liquidated damages.

However, turning to the good intentions cited by RBC concerning its plan to continue with the training of local and minority labor, consideration could be given to the "public purpose" rule. Although RBC would privately benefit from the waiver of the liquidated damages, a public purpose could perhaps be found in RBC's commitment to developing the skills of local minority labor. This finding, if it is to be made, would be a matter for legislative discretion. Certainly the City Council has the authority to find that RBC's commitment to the training program serves a public purpose. If your department and the City Manager believe that waiving the damages would serve a legitimate public purpose, that recommendation could be forwarded with a request for Council action. Otherwise, it is supposed that any member of the Council could request docketing on his or her own initiative.

It is suggested that consideration also be given to the practical

and actual effects of waiving these damages. As a practical matter, the possible effect of this being a precedent for future waivers should be weighed. Further, there is an issue regarding assurances from RBC that funds will go toward the asserted public purpose -- this issue is raised not at all in question of RBC's integrity, but as a matter concerning the enforceability of the commitment. Before an appropriate consideration of whether there is a public purpose, a structured agreement between RBC and the respective training programs would have to be in place. Last, consideration should perhaps be given to the City's actual damages for the late completion. There was additional public overhead incurred, part of which entailed paying the City of Coronado additional costs for special operation of the trans-bay pump station. These actual damages should be evaluated when considering whether and to what extent there is a public purpose in waiving the liquidated damages.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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Attachment:Correspondence

ML-95-57