

MEMORANDUM OF LAW

DATE: September 21, 1995

TO: Afshin Oskoui, Acting Deputy Director, Engineering
Division, Water Utilities Division

FROM: City Attorney

SUBJECT: Water Utilities' Approved Material List

By memorandum dated August 22, 1995, you report that as part of STEP, a suggestion was received to expand the current Approved Materials List to include major mechanical/electrical equipment (eg., pumps, motors, generators) for installation in pump stations. You further explain that major equipment is currently addressed on a project by project basis, with performance specifications developed by the design engineer. You specifically request a legal opinion regarding the feasibility of expanding the current Approved Materials List relative to impacting competitive bidding or restraining trade.

California Public Contract Code, section 3400, specifically deals with approved materials lists.F

In fact, Article 5, which contains section 3400, is entitled, "Preference for Materials."

The only requirements for a materials list are as follows:F

The following does not apply when the governing body designates by resolution a specific brand or trade name for testing to determine suitability for future use, and includes that designation in the specifications. Cal. Pub. Con. Code '3400(b).

1. The specification must list at least two brands or trade names of comparable quality or utility;
2. The specification must be followed by the words "or equal" so that bidders may furnish any equal material, product, or thing;
3. If the specifying agency is aware of an equal product manufactured in California, that product must be named; and,
4. The specifications must allow 35 days after award of the contract for submission of data substantiating a request for substituting an "or equal" item.

Cal. Pub. Con. Code Section 3400(a); see also, Standard Specifications for Public Works Construction (Green Book), 1994

ed., section 4-1.6.

In evaluating the Department's current policy, it appears that Department Instruction 55.29, coupled with the letter to applicantsF

Attachment 1 to Department Instruction 55.29.

already includes a process for regular review of the list and procedure for applying for list expansion. Therefore, so long as the Department complies with Department Instruction 55.29 and Public Contract Code section 3400, expanding the approved materials list should have no impact on competitive bidding or restraining trade.

It should be noted, however, that the current list may not comply with section 3400. For example, page 7 of the list includes ABS sewer fittings,F

See, San Diego Water Utilities Approved Materials List, September 1, 1994, page 7.

yet only one brand is listed. Unless the absence of another brand is due to a lack of known alternatives, or the public interest requires the use of a unique or novel product application, then the Department needs to review its approved list with the above four requirements in mind.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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