

## MEMORANDUM OF LAW

**DATE:** May 2, 1997

**NAME:** Eugene T. Ruzzini, Audit Division Manager, Auditor and Comptroller's Office

**FROM:** City Attorney

**SUBJECT:** Sole Source Contracts

By memorandum to the City Attorney dated November 18, 1996, you requested answers to numerous legal questions concerning "sole source" procurement, with particular focus on certain procurements of the Metropolitan Wastewater Department (MWWD). The questions generally concern the interpretation of San Diego Municipal Code (SDMC) sections 22.0504 and 22.0505, and City Council Policy 300-7. You requested that we expand upon the advice given in a March 2, 1995 Memorandum of Law (copy attached), and also asked for a review of seven specific MWWD sole source procurements.

### **SHORT QUESTIONS AND ANSWERS**

**1. Question:** Is procurement of expert or professional services governed by SDMC section 22.0504?

**Answer:** No. Professional services are contracted according to Council Policy 300-7.

**2. Question:** Is sole source procurement permissible only in emergencies affecting health and safety?

**Answer:** No. Sole source procurement is permissible for other reasons if lawfully certified by the City Manager or authorized designee.

**3. Question:** What is meant by the language in SDMC section 22.0504 which allows for sole source procurement “provided *certification to this effect* is approved by the City Manager?”

**Answer:** The intent of the language is to vest the City Manager with the discretion to certify procurements as “sole source” under several justifiable circumstances.

**4. Question:** If a brand name is specified for purposes of compatibility with existing City equipment, would the procurement be considered “sole source” and not subject to competitive bidding?

**Answer:** Yes or no, depending on whether the City Manager has certified the brand as a sole source.

**5. Questions:** Does selection of a specific brand name for purposes of establishing a standard meet the requirements of SDMC section 22.0505(d)? If not, is it within the definition of sole source?

**Answers:** Yes and no, respectively. Specification of a brand name in and of itself does not make the procurement a sole source solicitation, nor justify the procurement as a sole source, unless the City Manager has specifically certified the brand as a sole source. Absent a sole source certification, “equals” may be offered pursuant to SDMC section 22.0505(d).

**6. Question:** What actions should reasonably be taken before determining that a product or service is available from only one source?

**Answer:** This will depend on the specifics of each procurement. The City Manager has the discretion to determine in each case whether reasonable action was taken to determine that a needed product or service is available from only one source.

**7 Question:** Who has the authority to determine that there is no permissible substitute?

**Answer:** The City Manager or his designee.

**8. Question:** Is the term “consultant” synonymous with the term “professional or expert services?”

**Answer:** Yes.

**9. Question:** Is the retainer of professional or expert services on a sole source basis a subject that is controlled by Council Policy 300-7?

**Answer:** Yes.

**10. Question:** What is meant by the term “substantive reasons” as that term appears in Council Policy 300-7 in reference to the selection of consultants on a sole source basis?

**Answer:** The term refers to reasons that are real and appreciable, not reasons that are merely apparent, indefinite, or false.

**11. Question:** What actions should reasonably be taken before determining that a consultant should be retained on a sole source basis?

**Answer:** The City Manager has the discretion to determine in each specific case whether circumstances justify the sole source retainer of a consultant. Since the process for selecting consultants is governed by policy rather than ordinance, the Manager's discretion in selecting consultants is very broad.

**12. Question:** If the City Manager delegates the authority to certify sole source procurements to a department head, does the department head have the authority to sub-delegate that authority? If so, to what extent?

**Answer:** No. The department head may not sub-delegate the authority to certify sole source procurements unless the City Manager has expressly authorized it in the original delegation.

## ANALYSIS

Most of your questions refer to the text of the Municipal Code and Council Policy provisions, without reference to any specific factual situation. These questions are restated below following quotations from the Municipal Code necessary to understanding the basis of your inquiries. Italics used in citing the Municipal Code have been added for emphasis.

### PERSONAL SERVICE CONTRACTS DISTINGUISHED FROM PROFESSIONAL SERVICE CONTRACTS

In relevant part, the first paragraph of SDMC section 22.0504 authorizes the Purchasing Agent to "purchase materials, supplies, equipment and, subject to the provisions of the City Charter and section 23.1801 of this Code, to provide for contracts for personal services, as defined in this section . . ." The concluding sentence of the first paragraph of the section provides: "*For purposes of this section the term 'contracts for personal services' excludes contracts for professional or expert services.*"

**1. QUESTION:** Does the language italicized above mean that sole source procurement for contracts for professional or expert services are not governed by SDMC section 22.0504?

**ANSWER:** Yes. Procurement of expert or professional service contracts is not governed by SDMC section 22.0504, but instead by provisions of state law and City Council Policy 300-7. This will be more fully explained in response to Question No. 9 below.

### SOLE SOURCE PROCUREMENT NOT CONFINED TO EMERGENCIES

Both the third and fourth paragraphs of SDMC section 22.0504 contain an identical sentence which reads: "*The Purchasing Agent shall not be required to advertise for sole source procurement provided certification to this effect is approved by the City Manager.*" Both the third and fourth paragraphs of that section also contain exceptions to the general provisions for "*case(s) of bonafide emergency. . .*" The complete quotation of these paragraphs is necessary to understand your questions which follow.

The third paragraph of SDMC section 22.0504 reads:

The Purchasing Agent shall not purchase materials, supplies, equipment and insurance, nor enter into contracts for personal services requested by various departments or offices of the city, where said purchase exceeds the sum of fifty thousand dollars (\$50,000) without having first advertised for sealed proposals, *except in the case of a bonafide emergency* affecting public health or safety in which case he shall thereafter immediately report the fact to the City Council. *The Purchasing Agent shall not be required to advertise for sole source procurement provided certification to this effect is approved by the City Manager.*”

The fourth paragraph of SDMC section 22.0504 reads:

If the cost of any purchase or contract for personal services required by the City is in excess of one million dollars (\$1,000,000), said purchase or contract for personal services may be made by the Purchasing Agent only after said Purchasing Agent has advertised for sealed proposals and has obtained Council approval to award the contract, *except in the case of a bonafide emergency* affecting public health or safety in which case he shall thereafter immediately report the fact to the City Council who shall then by Resolution so note and ratify the procurement. The authority to so purchase shall be limited to \$200,000. *The Purchasing Agent shall not be required to advertise for sole source procurement provided certification to this effect is approved by the City Manager.*”

**2. QUESTION:** In view of the language emphasized above, is a sole source procurement permissible only in the case of a bonafide emergency affecting public health or safety?

**ANSWER:** No. Sole source procurement is permissible in any instance where the City Manager lawfully certifies its use. These instances are not necessarily confined to emergency situations. Although the third and fourth paragraphs of the section each provide an exception to a general rule for cases of bonafide emergency, the object of that exception is not sole source procurement. This exception applies to the general rule that is the subject of the particular paragraphs and sentences where the exception appears. For purposes of statutory construction, a word or phrase will be given the meaning that the legislature plainly intended it to have, *in the place where used*. *In re Bugler*, 45 Cal. 553 (1873); *Martin v. Zellerbach*, 38 Cal. 300 (1869). Thus, we must look at where the exception appears. In both the third and fourth paragraphs of section 22.0504, the exception for emergencies appears following a comma which offsets the principal subject of the sentence and paragraph, and sole source procurement is not the principal subject of either sentence or paragraph.

The subject of the third paragraph of SDMC section 22.0504 is the rule concerning the monetary procurement threshold at which the Purchasing Agent must advertise for bids (\$50,000). This threshold is ordained by the Council pursuant to the provisions of San Diego City Charter section 35. The exception for emergencies contained in that third paragraph does not pertain to sole source procurement, but to the general rule stated in the same sentence that establishes the advertising threshold. Similarly, the subject of the fourth paragraph of section 22.0504 is the monetary threshold at which procurements require Council approval for award (\$1,000,000). This limit is also fixed by the Council pursuant to the provisions of Charter section 35. The exception for emergencies contained in that fourth paragraph applies not to sole

source procurement but to the rule concerning the threshold at which Council approval is required for a procurement. Thus, in both the third and fourth paragraphs of the section, the context and placement of the exception for emergencies clearly indicates that the exception does not refer to sole source procurement; rather, the exception refers to the principal subject of each sentence and paragraph where the exception appears, i.e., the monetary threshold limits for advertising and award.

**3. QUESTION:** What is meant by the statement: “The Purchasing Agent is not required to advertise for sole source procurement, provided *certification to this effect* is approved by the City Manager”?

**ANSWER:** The quoted language means that if the City Manager certifies that sole source procurement is permissible, the Purchasing Agent is not required to advertise for bids.

The primary rule of statutory construction is that courts must ascertain the intent of the legislature, whenever possible, in order to effectuate the purpose of the law. Hogya v. Superior Court of San Diego County, 75 Cal. App. 3d 122, 132 (1977). Where the main purpose of the statute is expressed or otherwise ascertainable from the statutory language, it must be given effect, though it may not be consistent with the strict letter of the statute. Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 249 (1972); Coulter v. Pool, 187 Cal. 181, 185 (1921).

As will be discussed below in the answer to Question No. 4, the intent of the Legislature with respect to the language emphasized above is clearly to permit the City Manager to certify procurements as “sole source” under a variety of justifiable circumstances. As we advised in the March 2, 1995 Memorandum of Law, circumstances justifying sole source procurement certifications require use of sound discretion on the part of the City Manager or his designees. Decisions of public administrators may be challenged by petition for writ of mandamus, but the discretion vested in the Manager will be given great deference by the courts.

A court may not use mandamus to substitute its concept of discretion for the discretion which has been conferred by law on a public officer or body. Hutchinson v. City of Sacramento, 17 Cal. App. 4th 791, 796 (1993); Palmer v. Fox, 118 Cal. App. 2d 453, 456-57 (1953). While a writ of mandamus does not lie to control discretion conferred on a public officer, a court may issue such a writ on a showing of fraud, arbitrary action, or an abuse of discretion. Bowles v. Antonetti, 241 Cal. App. 2d 283, 286 (1966). An abuse of discretion is not the exercise of discretion, but is action beyond the clear limits of discretion. Browning v. Dow, 60 Cal. App. 680, 683-684 (1923).

#### REQUISITIONS - SDMC SECTION 22.0505

Your next questions concerned interpretation of SDMC section 22.0505, subsections (d) and (e). SDMC section 22.0505(d) addresses the use of brand names in procurement specifications. That subsection reads as follows:

d. Brand names. Specifications may include reference to a brand name for illustrative purposes only, provided each brand name is followed by the words “or equal.” Whenever reference to a specific brand name is made, it is illustrative and to be construed as a term of specification which describes a component that has been tested or evaluated by the City as best meeting the operational, design,

performance, maintenance, quality and/or reliability standards and requirements of the City, thereby incorporating these requirements by reference within the specification. An equivalent (“or equal”) may be offered by the bidder, subject to testing and evaluation at the option of the City prior to award of bid. The City reserves the sole right to reject a substituted component that will not fulfill requirements. It shall be the sole responsibility of the bidder to provide at bidder’s expense any product information, test data, or other information the City may require to fully evaluate the acceptability of the offered substitute. Where appropriate, independent testing including destructive testing or evaluation at bidder’s expense may be required as a condition of acceptance. *Exceptions to the foregoing are permissible for procurement for replacement parts, or for testing and evaluation purposes or where compatibility with existing City equipment is mandated.*

SDMC section 22.0505(e) defines the meaning of the term “sole source” as follows: “e. ‘Sole Source.’ As used in this Division, ‘sole source’ means that the procurement is available from only one source and there is no permissible substitute.”

**4. QUESTION:** If a brand name is specified for purposes of compatibility with existing City equipment, would the procurement be considered sole source and not subject to competitive bidding?

**ANSWER:** Yes, but only if the City Manager has made a sole source certification for that brand name pursuant to SDMC 22.0504. If the City Manager has not certified a sole source procurement for that brand name, then according to the general provisions of SDMC section 22.0505(d), the appearance of that brand name in the specification would be for illustrative purposes only and the name would be deemed to be followed by the words “or equal,” and bids using functionally equivalent brands would not be precluded.

Sole source procurement is an exception to the general rule which allows for the submission of equivalents. It is very important to observe that the definition of “sole source” as provided by SDMC section 22.0505(e) applies to the entire *Division* of the Municipal Code which pertains to the Purchasing Agent. The *Division* encompasses SDMC sections 22.0501 through 22.0517, inclusive. Thus, where the term “sole source” appears in SDMC section 22.0504, the term’s meaning is defined by SDMC section 22.0505(e) (i.e., it means that the procurement is available from only one source and there is no permissible substitute).

Thus, referring back to Question No. 3, the apparent legislative intent of SDMC sections 22.0504 and 22.0505, when read together, is to vest the City Manager with discretion to certify certain procurements as “sole source” in cases where he believes procurement is available from only one source and there is no permissible substitute. Instances where there may justifiably be no permissible substitute would include situations where compatibility with existing equipment so demands, or where testing and evaluation of a prototypical product or service is required, or where the goods or services are proprietary (e.g., patented or copyrighted). In addition, emergencies are an additional but distinct circumstance where sole source procurement may be permissible.

**5. QUESTION:** Does selection of a specific brand name for purposes of establishing a standard meet the requirements of SDMC section 22.0505(d)? If not, is it within the definition of sole source?

**ANSWER:** Specification of a brand name does not in and of itself establish a sole source procurement. Unless the City Manager has certified a brand name for sole source procurement, reference to the brand name in the specification will be construed as a mere example of a product that will suffice to meet contract requirements, and pursuant to SDMC section 22.0505(d), the reference will be deemed to be followed by the words “or equal.” The only cases where the words “or equal” will not be imputed to follow a reference to a specific brand name are the exceptions where the City Manager has authorized a sole source because there is only one source and no permissible substitute.

**6. QUESTION:** Considering the global economy, what actions should reasonably be taken before determining that a product or service is available from only one source?

**ANSWER:** This question can only be answered on a case by case basis. Depending on the situation, a conclusion that only one source exists could be based on certainty (e.g., as in the case of proprietary technology), or it could be based on a lack of information about other possible sources. In cases where a lack of awareness about other products or personal service providers forms the basis for listing only one brand name, sole source certifications should typically be avoided because there is insufficient certainty that only one acceptable source exists. It is not improper to list only one acceptable brand name; however, this would not amount to a true sole source procurement, because SDMC section 22.0505(d) provides that such brand listing is only an example of an acceptable item, and suppliers believing they have an “equal” would be free to submit their own brand for evaluation.

Where greater certainty has led to formal certification, the question is whether that certainty is reasonable. What constitutes a reasonable effort to identify possible equals will vary from case to case, depending on the product or service in question and the circumstances surrounding the need for procurement. The City Manager or his designee is vested with discretion to make these determinations and hence will be presumed to have acted reasonably in certifying sole source procurements. The presumption can be overcome by showing the decision was arbitrary or fraudulent and therefore an abuse of discretion. Questions into whether the Manager’s discretion is being abused in a given case could be raised by anyone, including the City’s independent departments. However, pursuant to SDMC section 22.0504, the City Manager is vested with the discretion to make the final determination. On the deference given to this discretion, see the answer to Question No. 3 above.

**7. QUESTION:** Who has the authority to determine that there is no permissible substitute?

**ANSWER:** The City Manager or his designee.

#### COUNCIL POLICY 300-7 PARAGRAPH A.3 -- SOLE SOURCE RETAINER OF CONSULTANTS

Council Policy section 300-7 Paragraph A.3 provides for the sole source retainer of professional consulting services in certain circumstances. Pertinent language of that paragraph reads as follows:

In particular instances it may be desirable to use a ‘sole source’ *consultant*. This decision must be based on circumstances where competition is not feasible and such selection must be

adequately justified. Such justification must contain *substantive reasons* as to why only one firm was selected and must reference specific items such as time constraints, cost savings, and *unavailability of similar expertise*.

**8. QUESTION:** Is the term “consultant” as used in Council Policy 300-7 synonymous with “professional or expert services” as used in SDMC sections 22.0226 and 22.0504? (SDMC section 22.0226 establishes monetary limits on the City Manager’s authority to award “consultant” contracts.)

**ANSWER:** Yes. Consultants are persons or firms who render professional or expert services.

**9. QUESTION:** Since the SDMC is silent on sole source procurement for professional or expert services, is Council Policy 300-7 the authoritative guidance for such procurements?

**ANSWER:** Yes. The process for selection of consultants is not a “low bid” process. Rather, it is a competitive process involving evaluation of proposals. Although Council Policy 300-7 applies to the selection of all types of consultants, its principal application is to contracts for professional architectural and engineering services, which constitute the majority of City consultant contracts. In this sense, Council Policy 300-7 implements the same principles as Government Code sections 4525-4529, which is the state law on this subject. Government Code section 4526 provides:

Notwithstanding any other provision of law, selection by a state or local agency head for professional services of private architectural, landscape architectural, engineering, environmental, land surveying, or construction project management firms shall be on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required. In order to implement this method of selection, state agency heads contracting for private architectural, landscape architectural, professional engineering, environmental, land surveying, and construction project management services shall adopt by regulation, and local agency heads contracting for private architectural, landscape architectural, professional engineering, environmental, land surveying, and construction project management services may adopt by ordinance, procedures that assure that these services are engaged on the basis of demonstrated competence and qualifications for the type of services to be performed and at fair and reasonable prices to the public agencies . . . .

Government Code section 4528(a)(1) provides: “The state agency head shall negotiate a contract with the best qualified firm for architectural, landscape architectural, engineering, environmental, land surveying, and construction project management services at compensation which the state agency head determines is fair and reasonable to the State of California or the political subdivision involved.”

As has been noted, Council Policy 300-7 also contains selection procedures for all consultants and not just architects and engineers. The language of the Council Policy requires the City Manager to determine which firm is the best qualified consultant, whereupon compensation is subject to negotiation. The Council Policy generally provides for a Request for Proposal process in which the best qualified consultant is typically identified through a review of



competitive proposals. The Council has determined that these guidelines serve the public interest in determining which consultant is best qualified to perform the work. However, the Council also recognizes that there will be times when for a variety of reasons the advantages of this competitive approach are outweighed by countervailing considerations, and that in these cases the “best qualified” consultant should be selected as a sole source. Council Policy 300-7, Paragraph A.3.

**10. QUESTION:** What is meant by the term “substantive reasons” as that term appears in Council Policy 300-7, Paragraph A.3?

**ANSWER:** The plain meaning of the term requires reasons that are material, reasons that are real rather than apparent. “Substantive” derives from the noun “substance,” the pertinent definition of which is given by Webster’s Ninth Collegiate Dictionary to mean an “ultimate reality that underlies all outward manifestations and change.” Hence, the term “substantive reasons” in the practical sense means reasons that are real and appreciable, not reasons that are merely apparent, indefinite, or false.

**11. QUESTION:** Considering the global economy, what actions should reasonably be taken before determining the availability of similar expertise?

**ANSWER:** See the answers to Question Nos. 6 and 10 above. As with procurement of personal property and personal (non-professional) services, the required due diligence toward identifying possible alternatives before resorting to a sole source for professional consultant contracts will also depend on the particular services and circumstances in question. It involves a question whether the sole source decision is reasonable under all the circumstances and is adequately supported by substantive reasons. Again, on this point, the City Manager is vested with discretion. Explanations supporting a sole source procurement for professional services should include information as to what efforts were made to identify and/or exclude alternatives, actual identification of other possible sources, if any, and if there may be other sources, why they have been excluded.

#### DELEGATION OF SOLE SOURCE PROCUREMENT AUTHORITY

\_\_\_\_\_The Memorandum of Law dated March 2, 1995 concluded that “(t)he 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.”

**12. QUESTION:** Does the department head to whom the City Manager delegated that authority to certify sole source procurements have the ability to sub-delegate that same authority to others? If so, to what extent?

**ANSWER:** No. The department head or acting department head may not sub-delegate the authority to certify sole source procurements unless the original delegation from the City Manager expressly authorized sub-delegation. The City Manager derives the authority to delegate powers and responsibilities to department heads from San Diego City Charter section 28, which provides in relevant part:

\_\_\_\_\_Except as otherwise provided in this Charter, all other powers conferred by the laws of the state upon any municipal official shall be exercised by the City Manager *or persons*

*designated by him . . . . The Directors, or heads of the administrative departments under the Manager shall be immediately responsible to him for the efficient administration of their respective Departments.*

. . . .

The Manager shall execute all contracts for the departments under his control. He shall approve all requisitions and vouchers for said departments in person *or through such assistants as he may designate for this purpose.*

The Manager may prescribe such general rules and regulations as he may deem necessary or expedient for the general conduct of the administrative departments. The Director of each Department shall in like manner prescribe such rules and regulations as may be deemed necessary or expedient for the proper conduct of each Department, *not inconsistent with the general rules and regulations provided by the Manager.*

Thus, to answer whether a department head may sub-delegate sole source procurement certification authority, the underlying delegation from the City Manager must be reviewed to determine whether such sub-delegation would be inconsistent with the terms provided by the Manager. The City Manager delegated sole source procurement authority to the Metropolitan Wastewater Department director by a memorandum dated January 30, 1995 (copy attached). The relevant language from that delegation memorandum states that “[p]ursuant to the provisions of SDMC section 22.0504, *you* (the MWWDD director) are authorized to certify on my behalf sole source procurements for purchases of materials, supplies, and equipment; contracts for personal services; and contracts for professional consultants... (provided each certification is in writing and the contract does not exceed \$200,000.00).” Since the delegation was made exclusive to the department head in this instance, only the director or acting director would have the authority to exercise the delegated authority to certify sole source procurements. Sub-delegation would be inconsistent with the delegation memorandum, and would thus be contrary to the limitations of Charter section 28.

#### SPECIFIC INSTANCES OF METRO WASTEWATER DEPARTMENT SOLE SOURCE PROCUREMENT

\_\_\_\_\_ You requested legal review of seven specific instances of sole source procurement by the Metro Wastewater Department. Your memorandum did not include copies of the documents affecting the delegations (if any), so this review does not analyze whether the delegations were properly authorized. We can conduct such a review, if the controlling documents are provided. However, for purposes of analyzing the seven instances listed below, we assume that all delegations were properly authorized. These sole source procurements will be identified by contractor or consultant name, the date of the certification, an abbreviated description of product or service contracted, and brief description of the sole source justification. Copies of the sole source certification documents were routed through this office for each of these transactions when they arose, and all appeared to be supported by adequate justification. However, your memorandum did not include these certifications, so the following answers are based entirely on the facts presented in your audit summary.

A. Consultant: Environmental Consultants AB

Date: March 11, 1996

Services: Evaluation of performance of the Point Loma wastewater plant; discuss its present operations and results. Make suggestions for performance improvement. Evaluate the effect of chemical treatment on toxicity testing results.

Justification: Swedish company is expert on specific sewage treatment technologies used in European countries but which are new to the United States.

Audit

Finding: Sole source request does not state estimated cost or term of services; contract not routed to Personnel Department for approval per A.R. 25.70; concludes an RFP could have been issued, as no time constraints were identified.

Legal

Comment: Council Policy 300-7 applies to this consultant contract. Even assuming there was a violation of 300-7, this would not be a legal violation, but a policy issue. It appears sufficient evidence exists to support a conclusion that the policy was followed because the sole source justification was supported by substantive reasons (unique expertise in technologies new to the United States). The City Manager has wide latitude in deciding what consultant is best qualified. Absence of cost and terms from sole source justification is irrelevant to the question regarding unique qualifications, which is the only subject at issue in the sole source certification. The routing of the contract for approval should be distinguished from the routing of the sole source justification. A.R. 25.70 does not pertain to the issue of sole source justifications, but to approval of contracts in general. Technically, the contract should have been routed to the Personnel Department, but the A.R. is a Manager regulation which can be waived by the Manager's own act in approving the sole source.

B. Consultant: Malcolm Pirnie, Inc.

Date: July 10, 1995

Services: Develop an urban and industrial pretreatment work plan and coordinate with EPA in order to meet discharge standards for Point Loma and North City Water Reclamation Plants.

Justification: Court-ordered time restraints did not provide time for issuance of RFP; EPA was impressed with this consultant's work for City of Phoenix and used this consultant to write its requirements for monitoring compliance of discharge.

Audit

Finding: Contract not routed to Personnel Department for approval per A.R. 25.70; contract exceeded first estimate of cost.

Legal

Comment: Manager's designee provided substantive reasons per Council Policy 300-

7, A-3 to support sole source contract. Although routing of a contract to Personnel Department is required by A.R. 25.70, this requirement is imposed by the Manager's regulations, and he may make exceptions. Retention of consultant helped satisfy the EPA concerning City's response to problem.

- C. Consultant: Varian Analytical Instruments
- Date: January 9, 1996
- Services: Purchase of a chromatograph to perform residential sewage analyses.
- Justification: This is a specialized instrument which has to be compatible with existing hardware, software, and protocol. The purchase price was lower than a similar model that was also compatible.
- Audit Finding: Compatibility with existing equipment and operational skills were the decisive factor for the procurement. The equipment was procured directly from the manufacturer.
- Legal Comment: The evidence supports this sole source procurement of equipment as certified by the City Manager or his designee under San Diego Municipal Code section 22.0504. The justification appears entirely reasonable.
- D. Consultant: Hewlett Packard Company
- Date: April 26, 1996
- Services: Purchase of a gas chromatograph/flame ionization detector to supplement existing City equipment.
- Justification: This is specialized laboratory equipment used to analyze industrial sewage; the hardware, software, and protocol were compatible with existing equipment and purchase of any other brand was not an option.
- Audit Finding: Compatibility with existing equipment by same manufacturer was the decisive factor, and the equipment was procured directly from the manufacturer.
- Legal Comment: Evidence supports sole source procurement as certified by the Manager or his designee according to San Diego Municipal Code sections 22.0504, 22.0505(e). Vendor was the sole source distributor of parts necessary to repair/maintain existing equipment owned by City.
- E. Consultant: Brach & Allard, Inc.
- Date: January 22, 1996

Services: Pilot program for drying sludge beds at Fiesta Island by injecting microbes.  
Justification: City was in violation of Air Pollution Control District regulations because of odors at Fiesta Island Treatment Facility while trying other sludge drying methods. Had to take corrective action immediately and this consultant performed successfully at Lake Elsinore.

Legal  
Comment: Evidence supports consultant contract as sole source under Council Policy 300-7, A-3. Justification gave sound substantive reasons. The alleged air quality violation required attention immediately.

F. Consultant: Hatch & Kirk, Inc.

Date: August 24, 1995

Services: Purchase of an ignition and starter parts for repair and maintenance of equipment at Point Loma Gas Utilization Facility.

Justification: This was a continuing purchase of equipment and consultant was the only supplier in Southern California.

Legal  
Comment: Evidence supports sole source procurement of equipment as certified by Manager or his designee under San Diego Municipal Code sections 22.0504, 220505(e). Vendor was sole distributor of parts necessary to repair/maintain existing equipment owned by City.

G. Consultant: Knoll North America, Inc.

Date: April 26, 1996 and May 31, 1996

Services: Purchases of office wall partitions for Metropolitan Operations Center.

Justification: This was same equipment used in remodeling of other City offices, and contractor honored City's prices from former contract for both purchases.

Legal  
Comment: It appears that this contract was actually competitively obtained at an earlier date and merely extended to allow this additional work at the same prevailing competitive price.

I hope this memorandum of law resolves your questions about sole source procurement and will provide adequate guidance for future reviews.

CASEY GWINN, City Attorney

By  
Frederick M. Ortlieb

Deputy City Attorney

FMO:mb:150:450(x043.2)  
Attachment  
ML-97-15