

DATE ISSUED: July 28, 2004 REPORT NO. 04-174

ATTENTION: Natural Resources and Culture Committee
Agenda of August 4, 2004

SUBJECT: Bid Protest Bonds and Clean up Revisions to City's Public Contracting Ordinance

REFERENCE: Chapter 2, Article 2, Divisions 30, 31 and 32 of the San Diego Municipal Code; Council Policy 000-29.

SUMMARY

Issue 1: Should the Mayor and City Council approve the proposed revisions to San Diego Municipal Code section 22.3029 and Council Policy 000-29, which would require bidders to submit a bid protest bond in order to obtain a formal bid protest hearing?

Issue 2: Should the Mayor and City Council approve the proposed revisions to certain sections within Chapter 2, Article 2, Divisions 30, 31, and 32 of the San Diego Municipal Code (all pertaining to administration of contracts for goods, contracts for services, public works contracts, and consultant agreements) in order to conform the Municipal Code to existing practices and case law?

BACKGROUND

Issue 1

Based on data from Fiscal Years 2002 - 2004, the City received 53 protests of invitations to bid and/or requests for proposals. Of those protests, approximately 91 percent did not result in any change in award of the project, indicating that the majority of these protests are without merit. In addition, staff from the City's Engineering & Capital Projects, Contracts Section, spent an average of 66 days to resolve each protest, thus causing delays in the City's award process. The City currently follows the protest procedures set forth in San Diego Municipal Codes [SDMC] section 22.3029 and Council Policy 000-29, but staff proposes changes to both SDMC section 22.3029 and Council Policy 000-29 to prevent a bidder's abuse of the protest process and ensure that contracts and proposals are awarded as expeditiously as possible.

Issue 2

Chapter 2, Article 2, Divisions 30, 31, and 32 of the SDMC contain provisions for award of public contracts, amendments to public contracts, and cooperative procurement with other public agencies. Over the last few years, the Auditor's Office, Contract Services Section within the Engineering and Capital Projects Department, and Purchasing Division within the Financial Management Department have identified certain inconsistencies or ambiguities in those provisions. Staff proposes changes to the existing language to clarify those inconsistencies and ambiguities.

DISCUSSION

Issue 1

SDMC section 22.3029 and Council Policy 000-29 set forth the current bid protest procedure for selection or rejection of bids and proposals. Under the current procedure, a Bidder may obtain a formal protest hearing by filing a written request within ten days of public announcement of the successful Bidder, or notice of designation of a Bidder as non-responsible.¹ A Bidder is only entitled to a formal hearing under the following circumstances: the protestor alleges that (1) the City failed to follow procedures or requirements, (2) City staff engaged in misconduct, or (3) the City incorrectly declared the protesting bidder as non-responsible. A Bidder is not entitled to a formal protest hearing for determinations of responsiveness.²

If a formal hearing is not granted because the Bidder's allegations do not fall under the criteria for a formal protest, the City will respond to the protest in writing, detailing the factual basis for its determination. At this point, protesting bidders who are not granted a hearing and who are not satisfied with the City's response may continue to submit unlimited, frivolous written protests. Since the City does not continue with award of the project until all protests are resolved, these additional protests significantly impact a project's implementation schedule and result in additional staff time spent on responses. There is currently no safeguard to prevent such abuse of the City's protest policy or a method of recovering costs associated with bid protests. For this reason, staff from the City's Contract Services Division and Purchasing Division is proposing a protest bond requirement.

The concept of a bid protest bond is not new. Other public contracting programs within the United States, including the City of Las Cruces, New Mexico, the State of Florida Department of

¹ A "Bidder" is defined in Council Policy 000-29 as a Person who has submitted a bid, proposal, or other document seeking award of a contract. "Non-Responsible" is defined in Council Policy 000-29 as a determination by the City that a Bidder does not have the quality, fitness and capacity to satisfactorily perform the work proposed in a Public Works Contract.

² "Responsiveness" is currently not defined in Council Policy 000-29, but has been interpreted to mean that a bid's responsiveness to the requirements set forth in the bid documents. The proposed revisions to Council Policy 000-29 (see attached strikeouts) include a definition for responsiveness.

Transportation, and the State of California have already implemented bid protest bond requirements to deter frivolous protests.³ The City's proposed policy is similar to those other programs in that, after a bidder submits an initial written protest and the public agency provides a preliminary determination, a protest bond is required to continue the protest. The proposed policy was shared with the construction industry, including AGC and EGCA, and was developed based on feedback and interaction with them. The City's proposed policy would operate as follows: Initial protests will be evaluated by City staff. A written response stating the City's decision and the basis for the decision will be provided for all protests. If the Bidder is not satisfied with the City's decision, the Bidder may request a formal protest hearing, but the request must be accompanied by bid protest bond or security in any of the following forms, as is the City's current bonding practice:

1. An appellate bond through a bonding company authorized to do business in California (sample attached);
2. Letter of credit or its equivalent from a federally insured financial institution such as a bank, savings and loan association, or credit union; or
3. Cashier's check or its equivalent payable to the City Treasurer

The amount of the bond or security requested of the protestor will depend upon the contract value. The proposed amounts are as follows:⁴

1. Five Thousand and no/100 dollars (\$5,000.00) for a contract valued at less than two hundred fifty thousand and no/100 dollars (\$250,000.00).
2. Ten Thousand and no/100 dollars (\$10,000.00) for a contract valued at between two hundred fifty thousand and no/100 dollars (\$250,000.00) and one million and no/100 dollars (\$1,000,000.00).
3. Twenty Five Thousand and no/100 dollars (\$25,000.00) for a contract valued in excess of one million and no/100 dollars (\$1,000,000.00).

If the protest meets the requirements of Council Policy 000-29 and the bond or security is in the correct amount and valid, the City shall accept the bond or security and shall give the protestor or its agent a written dated receipt stating the amount and type of bond. Failure to deliver a valid protest bond or security in the correct amount may cause the City to reject the bid protest. The appeal bond or security will be retained by the City pending the outcome of the appeals process. The protest board will determine the disposition of the appeal bond or security.

Based on anecdotal statements from the Purchasing Manager for the City of Las Cruces, New Mexico, the requirement to post a bid protest bond or other security has drastically reduced the

³ The State of California implemented a pilot program for its departments in 1997, which allows each department to impose a bid bond requirement in an amount of not less than ten percent of the contract value. See, for example, Division 2, Part 2 of the California Public Contract Code.

⁴ The cost of a protest bond is generally two to three percent of the bond value.

amount of trivial protests. If the City imposes a similar bid bond requirement, it is anticipated that the number of protests will decrease and the bid to award time for contracts will also decrease. The City will also save money in staff time from Contract Services, the City Attorney's Office, and project departments.

Issue 2

A. Sole Source Contracts

As a general rule, competitive bidding for the City's public contracts is a mandatory requirement. However, the City Attorney's Office has consistently opined that, based upon established California case law, competitive bidding may not be required "where the nature of the subject of the contract is such that competitive proposals would be unavailing or would not produce an advantage, and the advertisement for competitive bid would thus be undesirable, impractical, or impossible." A contract awarded under these circumstances is commonly known as a "sole source contract."

Although the City has entered into numerous sole source contracts based upon this well recognized exception, the City's current public contract ordinance does not specifically define under what circumstances a sole source contract is justified. The proposed revisions to San Diego Municipal Code sections 22.3003, 22.3006, 22.3026, 22.3037, and 22.3102 (see attached strikeouts) would incorporate the sole source principles authorized by case law and already in practice.

B. Amendments to Contracts

San Diego Municipal Code section 22.3036(a)(1) currently authorizes the City Manager to make alterations to contracts for goods, contracts for services, procurement contracts, and public works contracts if the cost of each alteration "is less than" \$200,000 and the cost of the alteration does not exceed the total amount authorized for the project by ordinance or resolution. The proposed revision to section 22.3036(a) (see attached strikeout) would clarify that the City Manager may authorize deductive alterations without a monetary limitation (i.e., alterations that decrease the contract amount).

SDMC section 22.3223 authorizes the City Manager to enter into a consultant agreement if the agreement does not exceed \$250,000 and the total amount of contract awards to the consultant, including the current award, does not exceed \$250,000 in any given fiscal year. The proposed revision to section 22.3223 (see attached strikeout) would clarify that the City Manager may enter into a consultant agreement and subsequent amendments that do not cumulatively exceed \$250,000.

C. Cooperative Procurement Contracts

Although encouraged by City Charter Section 35, the City Council policy on Joint Purchasing [CP 100-01] with another agency, which was adopted in 1962, and the current ordinance do not allow the City to fully implement joint purchasing to the City's advantage. In particular, SDMC

section 22.3212 sets forth the conditions under which the City's Purchasing Agent may award a contract without competitive bidding, but does not address the circumstance when the City's agency partner in a cooperative procurement contract can perform the procurement more advantageously. The proposed revision to SDMC Section 22.3212 (see attached strikeout) would create another exception to the City's competitive bidding requirement, which would allow the City to use another agency's competitive bidding process, for example a favorable bid price, when it is in the City's best interests to do so.

CONCLUSION

Issue 1

The proposed bid protest bond policy will ensure that only meritorious protests are considered; it reduces staff time and resources spent resolving protests that are not credible; and it reduces bid to award time.

Issue 2

The City's current public contract ordinance contains certain inconsistencies and/or ambiguities pertaining to the award of sole source contracts, amendments to contracts, and cooperative procurement. The proposed changes to Chapter 2, Article 2, Divisions 30, 31 and 32 would clarify those inconsistencies and ambiguities.

ALTERNATIVES

Issue 1

Impose a bid protest bond requirement by adopting the proposed changes to SDMC section 22.3029 and Council Policy 000-29.

Do not impose a bid protest bond requirement.

Issue 2

Adopt some or all of the proposed changes to SDMC Chapter 2, Article 2, Divisions 30, 31, and 32, all pertaining to award of sole source contracts, amendments to existing contracts, and cooperative procurement.

Do not adopt any of the proposed changes to SDMC Chapter 2, Article 2, Divisions 30, 31, and 32.

Respectfully submitted,

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ATTACHMENTS: [Sample Bid Protest Bond](#)
[Proposed Strikeout Ordinance](#)
[Proposed Strikeout Council Policy 000-29](#)