

## STRIKEOUT ORDINANCE

OLD LANGUAGE: ~~Struck Out~~

NEW LANGUAGE: Redline

(O-2004-116)

ORDINANCE NUMBER O-\_\_\_\_\_ (New Series)

ADOPTED ON \_\_\_\_\_

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING DIVISION 8, SECTION 22.0807, RELATING TO DEBARMENT; DIVISION 30, SECTIONS 22.3003, 22.3006, 22.3026, 22.3029, 22.3036, AND 22.3037, DIVISION 31, SECTION 22.3102 AND DIVISION 32, SECTIONS 22.3212, AND 22.3223, ALL RELATING TO ADMINISTRATION OF CONTRACTS.

### **§22.0807 Grounds for Debarment**

- (a) A final conviction, including a plea of nolo contendere, or final unappealable civil judgment of any one or more of the grounds lists in Section 22.0807(a)(1)-(5) constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the criminal conviction, plea, or civil judgment:
- (1) under any state or federal statute or municipal ordinance for embezzlement, theft, fraudulent schemes and artifices, fraudulent schemes and practices, bid rigging, perjury, forgery, bribery, falsification or destruction of records, receiving stolen property or any offense indicating a lack of business integrity or business honesty which affects the *person's* or its *affiliate's* responsibility;
- or,

- (2) for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; or,
  - (3) for violations of California Government Code sections 84300(c) and 84301 (sections of the California Political Reform Act requiring disclosure of true campaign donor), as they exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occur with respect to a City election; or,
  - ~~(4) for fraud or criminal offense in connection with obtaining a public contract; or,~~
  - ~~(5)~~ (4) for a conviction under federal or state antitrust statutes involving public contracts or the submission of offers or bid proposals;
- (b) A Fair Political Practices Commission enforcement order against a *person*, either following a hearing or by stipulation, that makes a finding of a violation of California Government Code sections 84300(c) and 84301, as those sections exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occurred with respect to a City election, constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the enforcement order.

(c) Any one of the following acts or omissions by a *person* also constitute grounds for permanent *debarment*:

- (1) the *person* committed any offense, ~~taken~~ took any action, or failed to take an action, which indicates a lack of business integrity and which could directly affect the reliability and credibility of performance of the *person* on future *contracts* with the *City*; or,
- (2) the *person* committed a violation of San Diego Charter section 97; or,
- (3) the *person* has committed any corrupt practice in bidding for or in any way seeking award of a *contract*, or has committed any corrupt practice in any way relating to a *City contract*; or,
- (4) the *person* was established to, or operates in a manner designed to evade the application of this Division or to defeat the purpose of this Division;

(d) Any two or more of the following acts or omissions by a *person* constitute grounds for *debarment* of that *person* for no less than three years and up to and including permanently:

- ~~(1) the *person* submitted two or more claims of computational or other error in a bid to the *City* within a two year period; or~~
- ~~(2) the *person* unsatisfactorily performed a *contract*; or,~~
- ~~(3)~~ (1) the *person* unjustifiably refused to properly perform or complete *contract* work or warranty performance; or,

- ~~(4)~~ (2) the *person* unjustifiably failed to honor or observe contractual obligations or legal requirements pertaining to the *contract*; or,
- ~~(5)~~ (3) the *person* used substandard materials, or has failed to furnish or install materials in accordance with *contract* requirements, even if the discovery of the defect is subsequent to acceptance of the project and expiration of the warranty thereof, if such defect amounts to intentionally deficient or grossly negligent performance of the *contract* under which the defect occurred; or,
- ~~(6)~~ (4) the *person* committed a violation of the Drug-Free workplace Act of 1988 (41 USC sections 701-707); or,
- ~~(7)~~ (5) the *person* willfully failed to cooperate in the investigation or hearing of the proposed *debarment*; or,
- ~~(8)~~ (6) the *person* performs, or fails to perform, a *contract* in such a way that environmental damage results or a violation of environmental laws or permits is committed; or,
- ~~(9)~~ (7) the *person* has not implemented its Equal Employment Opportunity Plan required by Municipal Code section 22.2705, or practices unlawful discrimination in employment, and the *person* has not taken corrective action after sufficient notice by the *City*;
- ~~(10)~~ (8) the *person* has falsified a statement of gross income submitted under the City's Minor Public Works Construction Project program; or,

~~(11)~~ (9) the *person* has committed an act or omission of so serious or compelling a nature that:

- (a) it affects the present responsibility of the *person* to be awarded a *contract* or to participate as a *subcontractor* in a *contract*; or,
- (b) it affects the integrity of the procurement process.

(10) Any one of the acts or omissions by a *person* listed in Section 22.0807(c).

~~(12)~~ ~~the *person* was established to, or operates in a manner designed to evade the application of this Division or to defeat the purpose of this Division;~~

~~(e)~~ ~~Any one of the acts or omissions by a *person* listed in Section 22.0807(d) shall constitute grounds for *debarment* of that *person* for no less than three years.~~

~~(f)~~ (e) The following acts or omissions by a *person* constitute grounds for *debarment* of that *person* for no less than one year.

- (1) the City issued the *person* two or more *performance evaluations* from the *City* with a rating of unsatisfactory within a two-year period; or,
- (2) the City has issued the *person* a *final performance evaluation* with a rating of unsatisfactory.
- (3) the *person* has failed to timely submit bond, *contract* documents, insurance documents or any other item required by the City,

acceptable to the *City* which conform to bid, request for proposal and/or *contract* requirements.

- (4) the *person* who is notified that they are the apparent low bidder on a *contract* has failed to timely submit on two or more occasions complete Equal Opportunity Outreach documentation that is required by Municipal Code section 22.2705 or by policies adopted pursuant to that Division and that is acceptable to the City.
- (5) the person submitted two or more claims of computational or other error in a bid to the City within a two-year period.

### §22.3003 Definitions

Terms defined in Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36 are indicated by italics. For purposes of Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36:

*Agency through Award* [No changes in text.]

*Award date* or *date of award* means the date that the City Manager or his designee signs the documents constituting a *public works contract*, ~~or contract for consultant services~~ contract, or consultant agreement, ~~manifesting the City's approval of~~ and all conditions precedent to award have been satisfied.

*Bidder* means a *person* who submitted a bid, proposal or other document seeking ~~award~~ award of a *contract*, ~~or a public works contract~~, or consultant agreement.

*Brand Name* refers to a specific product in specifications for ~~Goods~~ goods,

~~Services~~ services, or ~~Public Works~~ public works.

*City's Public Contracts Code* [No change in text.]

*Consultant* includes providers of expert or professional ~~services~~ services and excludes providers of ~~Services~~ services.

*Contract* includes a ~~Contract for Goods~~ contract for goods, a ~~Contract for Services~~ contract for services, or a ~~Cooperative Procurement Contract~~ cooperative procurement contract unless otherwise stated.

*Contract for Goods* [No change in text.]

*Contract for Inmate Services* means an agreement between the City and an ~~Agency~~ Agency for the use of inmates confined in state prisons, or probationers, or parolees to perform ~~Services~~ services.

*Contract for Services* means an agreement between the City and another party in which the City is the purchaser of ~~Services~~ services, excluding ~~Consultant~~ consultant services. It includes ~~Maintenance Contracts~~ maintenance contracts.

*Cooperative Procurement Contract* means a ~~Contract~~ contract entered into by the Purchasing Agent and another ~~Agency~~ agency to obtain ~~Goods~~ goods or ~~Services~~ services or an agency contract utilizing a bidding process that complies with City requirements.

~~*Emergency* means a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services.~~

~~*Emergency* means a crisis of such proportion that the public peace, property, health, or safety is at stake.~~

*Emergency* means an event of great public calamity, such as extraordinary fire, flood, storm, epidemic or other disaster.

*Evaluation Team* [No change in text.]

*General Requirements Contract* means a ~~Public Works Contract~~ public works contract which contains a unit price book of detailed specifications and unit prices for typical tasks. Specific construction projects are not contemplated or authorized at the time of ~~contract award~~ award. Work is authorized as required by a separate ~~task order~~ task order.

*Goods and Maintenance Contracts* [No change in text.]

*Major public works contract* means a *public works contract valued at* ~~more than~~ more than ~~\$250,000~~ more than \$250,000.

*Minor public works contract* means a *public works contract valued at* \$250,000 or less.

*Person* [No change in text.]

*Protest Body* means a panel appointed by the City Manager as needed to review evidence presented by all interested parties to determine whether the *evaluation team's* contract selection is in accordance with all applicable laws and guidelines.

*Public Meeting* [No change in text.]

*Public Works* means the construction, reconstruction, or repair of public buildings, streets, utilities and other *public works*.

*Public Works Contract through Responsiveness* [No change in text.]

*Services* means all work provided by ~~Persons~~ persons other than ~~Consultants~~ consultants. It includes ~~Maintenance Contracts~~ maintenance contracts. It excludes construction, reconstruction, or repair of public buildings, streets, utilities, or any other ~~public works~~. It also excludes ~~Goods~~ public works and goods.

*Sole Source* means ~~a Person who is the only source from which a procurement is available and there is no adequate substitute.~~ the recipient of the award of a public works contract, consultant agreement, or contract without competitive selection or bidding.

*Sole Source Contract* means a public works contract, consultant agreement, or contract awarded without competitive selection or bidding.

*Task Order* means an authorization for construction, reconstruction, repair and maintenance work under a ~~General Requirements Contract~~ general requirements contract.

*Valued at* [No change in text.]

**§22.3006 Bid Initiation; When Advertising in Official Newspaper Required for Public Works Contract**

- (a) *Major public works contracts* that provide for an expenditure of more than \$250,000 shall be advertised for a minimum of one day in the City Official Newspaper; provided, however, that no advertising shall be required for a sole source contract certified by the City Manager in accordance with section 22. 3037.
- (b) The City Manager may ~~award~~ award *minor public works contracts* without advertising. In lieu of advertising, the City Manager shall follow procedures set forth in ~~Division 36 of Chapter 2, Article 2, of this Municipal Code~~ Chapter 2, Article 2, Division 36, and in regulations adopted by the City Manager consistent with this Section and Division 36. The Manager's regulations shall ensure that the City seeks competitive prices either orally or in writing and shall ensure that the City Manager

has taken those prices under consideration before a *minor public works contract* is awarded.

**§22.3026 Award of Contracts and Public Works Contracts**

- (a) Except as provided in section 22.3026(b), for ~~Contracts or Public Works Contracts~~ contracts and public works contracts that are required to be advertised, the City may make the ~~award~~ award not less than ten calendar days after advertising in accordance with the following:
- (1) ~~Contracts for Public Works~~ Except for Sole Source Contracts authorized under section 22.3037, Public works contracts under sections 22.3102 and 22.3103 shall be awarded to the lowest ~~responsible~~ responsible and reliable ~~bidder~~ bidder that meets the specifications.
  - (2) ~~Contracts~~ Contracts, excluding ~~Contracts for Public Works~~ public works contracts, and ~~Consultant Contracts~~ consultant agreements, shall be awarded on the basis of the low acceptable bid that best meets City requirements under section 22.3211.
  - (3) ~~Contracts for procurement~~ Cooperative procurement contracts under a request for proposal or bid will be awarded on the basis of the proposal best meeting City requirements.
- (b) The City is authorized to ~~award~~ award ~~Contracts~~ contracts and ~~Public Works Contracts~~ public works contracts to the next ~~bidder~~ bidder that meets all requirements when the apparent successful ~~bidder~~ bidder under Section 22.3026(a)(1) or (2):~~(1)~~ does not meet deadlines for submitting

the required bond and insurance documents, ~~or~~

~~(2) does not, within ten calendar days after any original bond and insurance document were required to be submitted, request a hearing with the City Department where bids were submitted to show cause why the City should not proceed with action to award the contract to another bidder.~~

**§22.3029 Protests of Contract Award**

- (a) ~~Only~~ A non-selected *bidders bidder* may protest *award of a contract, public works contract, or consultant agreement to the selected bidder* by submitting a protest in writing to the City Department to whom the bids were submitted. written “Notice of Intent to Protest,” which shall be received by the City Department administering the contract *award*, no later than ten calendar days after the City’s *announcement* of the selected *bidder* or no later than ten calendar days from the date that the City issues notice of designation of a *bidder* as *non-responsible*. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Notice of Intent to Protest on the first work day following such weekend or holiday. The City shall disclose the method of *announcement* to all *bidders* in the bid documents. Failure to submit a timely Notice of Intent to Protest shall bar consideration of a protest.
- ~~(b) The written protest shall be submitted no later than ten calendar days after the City’s *announcement* of the selected *bidder* or no later than ten calendar days from the date that the City issues notice of *designation of a*~~

~~bidder as non-responsible. If the tenth calendar day falls on a week-end or City holiday, the protesting bidder may submit the protest on the first work day following such week-end or holiday. The City shall disclose the method of announcement to all bidders in the bid documents. Failure to submit a timely protest to the City shall bar consideration of a protest.~~

(b) The Notice of Intent to Protest shall state all grounds claimed for the protest and include supporting documentation. Failure to clearly state the grounds for the protest and provide supporting documentation shall be deemed a waiver of all protest rights.

~~(d)(c) The City Manager will review the protest to determine whether it conforms with the requirements of Section 22.3029 (b) and (c). If the City Manager determines that a protest hearing is required, the City Manager will appoint a Protest Hearing Board to hear the protest. The Protest Hearing Board will conduct the protest hearing in accordance with the Policy approved by City Council. The City Department administering the contract award shall review the Notice of Intent to Protest to determine whether it complies with section 22.3029(b) and whether a Protest Hearing is required under section 22.3029(d).~~

(e)(d) A protesting bidder shall clearly set forth in detail the factual basis for the protest and include all supporting information. The protesting bidder may present the evidence to support the protest at a Protest hearing. Hearing only when the alleged grounds for the protest are as follows:

- (1) The City failed to follow procedures or requirements specified in the Request for Bids or Request for Proposals or equivalent, including any amendments;
- (2) City employees or ~~*Evaluation Team*~~ *evaluation team* members engaged in misconduct or impropriety;
- (3) the City's designation of the protesting *bidder* as non-*responsible* was incorrect. A protesting *bidder* shall not be entitled to a hearing to protest a *its own or another bidder's responsiveness*; however, the City ~~will allow a *bidder* to submit materials concerning its own *responsiveness*. In the event that the City determines that a *bidder* is non-*responsive*, the City will provide notice to the subject *bidder* detailing the factual basis for such determination~~ Manager may exercise discretion and allow a *bidder* designated as non-*responsive* by the City Department to file a Formal Protest, pursuant to the Formal Procedures set forth under this section 22.3026, if the City Manager determines that a hearing is necessary to resolve a relevant factual issue that cannot be determined from the face of a bid document or proposal.

- (e) After review of a *bidder's* Notice of Intent to File a Protest, the City Department will provide written notice to the *bidder* of its determination, detailing the factual basis for the City's determination. Service of the City Department's determination shall be made in accordance with one of the methods listed in Municipal Code section 11.0301.

(f) If the *bidder* desires to continue its protest notwithstanding the City Department's determination, the *bidder* must submit a written Formal Protest, which shall be received by the City Department administering the contract award within ten calendar days of service of the City Department's determination. If the tenth calendar day falls on a weekend or City holiday, the protesting *bidder* may submit the Formal Protest on the first work day following such weekend or holiday. Failure to file a timely written Formal Protest shall bar consideration of the Formal Protest.

(g) The written Formal Protest shall include a detailed factual response to the City Department's determination, including all supporting documentation. The *bidder* shall also include a bid protest bond in any of the following forms: a surety bond from a California licensed surety, an irrevocable standby letter of credit, certified check, cashier's check or money order, made payable to the City of San Diego. The bid protest bond shall be in the following amounts:

<u>Contract Value (\$)</u>	<u>Bond Amount</u>
<u>Less than 250,000</u>	<u>\$5,000</u>
<u>250,000 – 1,000,000</u>	<u>\$10,000</u>
<u>Greater than 1,000,000</u>	<u>\$25,000</u>

(h) The City Manager shall appoint a *Protest Body* and determine whether the grounds stated in the written Formal Protest meet the requirements for a

Protest Hearing, as set forth in this section 22.3029. The *Protest Body* shall conduct the Protest Hearing in accordance with the Policy approved by City Council. The *bidder's* failure to comply with Formal Protest procedures set forth in the Policy approved by City Council shall bar further consideration of the *bidder's* Formal Protest.

- (i) If the *Protest Body's* decision upholds the determination of the City Department regarding the *award*, the *Protest Body*, at its discretion, may assess the City's costs of the Protest Hearing. The bidder shall then pay the assessed costs within thirty calendar days of service of the decision; otherwise the City may deduct the assessed costs from the bid protest bond provided by the bidder.
- (j) The decision of the *Protest Body* shall be issued in accordance with the Policy approved by City Council and shall become final on the date of service of the decision, in accordance with one of the methods listed in Municipal Code section 11.0301.
- (e) ~~(k)~~ The submittal of a written protest or the occurrence of a bid protest hearing. The *bidder's* filing of a Notice of Intent to File a Protest or written Formal Protest shall not preclude the City Manager from rejecting all bids and rebidding a ~~contract~~ contract.

**§22.3036      ~~Alterations in Contracts, Consultant Contracts, and Public Works Contracts~~**

- (a) Except as provided in section 22.3036(b), whenever it becomes necessary to make alterations in ~~Contracts~~ contracts, ~~and Public Works Contracts~~ public works contracts ~~and Consultant Contracts~~, the City Manager shall make

alterations only when authorized by the Council, unless such alterations meet all of the following criteria:

- (1) The cost of each alteration ~~is less than~~ does not increase the *contract or public works contract* amount by more than \$200,000;  
and
- (2) [No change in text.]
- (3) The City Manager certifies ~~in accordance with Section 22.3037~~ that the alterations are necessary to fulfill the purpose of the *contract*; and
- (4) [No change in text.]

(b) [No change in text.]

**§22.3037 City Manager's Certification of Sole Source Contract**

~~Except as provided in Section 22.3104(b), where Divisions 31 and 32 require City Manager certification, the City Manager may delegate that authority to the Assistant City Manager, Deputy City Manager, or any person expressly designated to make the certification.~~

- (a) The City Manager may certify that a *sole source contract* is justified because strict compliance with competitive selection or bidding requirements would be unavailing, or would not produce an advantage, or would be undesirable, impractical, or impossible.
- (b) The City Manager may delegate the *sole source* certification authority provided by section 22.3037(a) to the Assistant City Manager, Deputy City Manager, or any department Director.

**§ 22.3102 When Major Public Works Contracts May be Awarded by City Manager**

- (a) The City Manager may ~~award~~ award a *major public works contract* that provides for an expenditure of an amount equal to or less than \$1,000,000 provided that the following requirements are met:
- (1) [No change in text.]
  - (2) the *major public works contract* has been advertised as described in Section 22.3006 or has been certified by the City Manager as a *sole source contract* in accordance with section 22.3037; and
  - (3) [No change in text.]
- (b) All other *major public works contracts* that do not meet the requirements of Section 22.3102 (a) are required to be authorized by the City Council before being awarded by the City Manager. The City Council may authorize the City Manager to ~~award~~ award the public works contract if it has met the following requirements:
- (1) [No change in text]
  - (2) [No change in text]
  - (3) [No change in text]

**§22.3212 Contracts Not Required to be Competitively Bid**

The *contracts* listed in section 22.3212(a)-(g) are not required to be competitively bid:

- (b) A *contract* that provides for an expenditure of less than \$5,000;
- (c) A ~~Cooperative Procurement~~ *cooperative procurement contract* in an amount less than \$10,000;

- (c) A ~~contract~~ to remedy an ~~un bona fide emergency~~ emergency that affects public health or safety, provided that:
- (1) The Purchasing Agent immediately reports the ~~emergency award~~ emergency award and its justifications to the City Council, and
  - (2) The Council by resolution acknowledges and ratifies the procurement;
- (d) A cooperative procurement contract administered by an agency provided that:
- (1) The City Manager certifies in writing that the cooperative procurement contract is in the best interests of the City; and
  - (2) The cooperative procurement is to the City's economic advantage; and
  - (3) The agency's bidding process substantially complies with the City's competitive bidding requirements.
- ~~(d)~~ (e) A ~~contract~~ that is available from a ~~Sole Source~~ Sole Source only, if, in advance of the ~~contract~~, the City Manager certifies in writing in accordance with Section 22.3037 the ~~Sole Source~~ Sole Source status of the provider;
- ~~(e)~~ (f) [No change in text.]
- ~~(f)~~ (g) [No change in text.]
- ~~(g)~~ (h) [No change in text.]

**§22.3223 Consultant Contracts**

Except as otherwise provided by Charter or ordinance, the City Manager may enter a ~~contract~~ contract with a ~~Consultant~~ Consultant to perform work or give advice without first seeking Council approval provided that both of the following conditions exist:

- (a) the contract and any subsequent amendments ~~does~~ do not exceed \$250,000 in any given fiscal year; and
- (b) the total amount of ~~contract~~ contract awards to the Consultant including the current ~~award~~ award, in any given fiscal year does not exceed \$250,000.

APPROVED: CASEY GWINN, City Attorney

By \_\_\_\_\_  
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