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MEMORANDUM OF LAW

DATE: December 12, 2003
TO: Park and Recreation
FROM: City Attorney
SUBJECT: Oak Park Tot Lot

INTRODUCTION

The Park and Recreation Department [PRD] has requested an opinion from our office on whether the City may award a contract for design and installation of a tot lot to an unlicensed vendor who can subcontract out the portions of work for which a license is required. PRD has also requested clarification on whether a vendor can install pre-fabricated playground equipment without a license. This memorandum addresses those issues.

QUESTIONS PRESENTED

1. May the City award a contract for design and installation of a tot lot to an unlicensed vendor who can subcontract out the portions of work for which a license is required?
2. May a vendor install pre-fabricated playground equipment without a license?

SHORT ANSWERS

1. The City may not award a contract for design and construction of a tot lot to an unlicensed vendor if the scope of work entails operations that would require a license (e.g., excavation, grading, trenching, paving and surfacing or cement and concrete works). This rule applies even if the vendor hires licensed subcontractors to complete work for which a license is required.
2. A vendor is required to have a contractor's license to install playground equipment that becomes a fixed part of the tot lot improvement.

BACKGROUND

The Park and Recreation Department [PRD] recently published a Request for Proposals for the design and installation of the Oak Park tot lot [Tot Lot]. The scope of work of the Tot Lot, which is typical of tot lot improvements, entails the following services: removal of existing playground equipment; removal of existing sand; sub-grading soil to a depth of 16 inches; installing playground equipment into ground, pouring cement footings to keep playground equipment fixed into ground; preparing the sub-grade for surfacing materials; installing final surfacing materials; and installing curb cuts in an existing concrete curb to satisfy federal and state disabled access requirements.

The contract value for the Tot Lot is approximately \$125,000. According to PRD, the procurement of the playground equipment comprises approximately ninety percent of the contract value. The bid package for the Tot Lot currently requires bidders to have a Class A or C-61 contractor's license. Because ninety percent of the contract value is attributable to the procurement of playground equipment and the remaining ten percent is for installation and associated improvements, PRD has asked whether the City could advertise future tot lot bid packages without a license requirement so that unlicensed playground equipment vendors could bid on contract and subcontract out the improvement work that requires a license. The ostensible advantage of this modified bid package would be to encourage more vendors to compete for bids and minimize overhead costs that would otherwise be charged by licensed prime contractors on the equipment provided by vendors.

ANALYSIS

I. A contractor must be licensed to bid on work related to the City's tot lot improvements.

Contractors within the State of California are subject to strict licensing requirements known as the Contractors' State License Law. The purpose of the Contractors' State License Law is to protect the public from incompetence and dishonesty in those who provide building and construction services. *Hydrotech Systems, Ltd., v. Oasis Waterpark, et al.*, 52 Cal. 3d 988, 995 (1991) (*citing Lewis & Queen v. N.M. Ball Sons*, 48 Cal. 2d 141, 149-150 (1957)). Contracts between public entities and contractors are not exempt from requirements of the Contractors' State License Law. *K & K Services, Inc. v. City of Irwindale*, 47 Cal. App. 4th 818, 825. (1996).

The Contractors' State License Law is set forth in Chapter 9 of the California Business and Professions Code sections 7000-7190.

California Business and Professions Code section 7026 defines a "contractor" as follows:

[C]ontractor is any person who undertakes to *or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to*, or does himself or herself *or by or through others*, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of

scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith..., and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise. "Contractor" includes subcontractor and specialty contractor. (Emphasis added.)

The term "contractor" applies even if a contractor hires licensed subcontractors and does not undertake to do any work himself or herself, as long as the contractor undertakes to perform the work by contract. *See, e.g., Vallejo Development Company v. Beck Development Company*, 24 Cal. App. 4th 929 (1994) (court held that general engineering contractor's license was required for work of installing infrastructure which developer agreed to perform and, thus, unlicensed developer was barred from enforcing mechanics' liens to recover for breach of construction contract, even though work was performed by licensed subcontractors). Therefore, the City may not award a public works contract to an unlicensed prime contractor on the premise that the unlicensed prime will hire licensed subcontractors to do work for which a license is required.

II. A contractor is required to have a general engineering license or equivalent specialty license in order to bid on tot lot improvements.

For the purpose of classification, the contracting business includes any or all of the following branches:

- (a) General engineering contracting (Class A license).
- (b) General building contracting (Class B license).
- (c) Specialty contracting (Class C license).

A general engineering contractor "is a contractor whose principal contracting business is in connection within fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: ... *parks, playgrounds and other recreational works, ... excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above mentioned fixed works.*" (emphasis added) Cal. Bus. & Prof. Code §7056. Because the state licensing statute requires a Class A license for working on "parks, playgrounds and other recreational works" and improvements associated with those projects, and City contracts are not exempt from state licensing laws, the City must require its bidders on tot lot projects to hold a Class A license.

A specialty contractor "is a contractor whose operations involve the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts." Cal. Bus. & Prof. Code §7058(a). The Contractors' State License Board has classified specialty contractor trades into subcategories. For example, a Class C-61 license is defined as a "Limited Specialty," which means that the contractor is limited to a field and scope of operations of specialty contracting (e.g., installation of pre-fabricated equipment) for which an applicant is qualified other than any of the specialty classifications listed in title 16, division 8, article 3 of the California Code of Regulations. California Code Regulations, title 16, §832.61.

The Contractors' State License Law does not prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades, if the performance of the work in the crafts or trades, other than in which he or she is licensed, is incidental and supplemental to the performance of the work in the craft for which the specialty contractor is licensed. Cal. Bus. & Prof. Code §7059(a). Work is "incidental and supplemental" to the work for which a specialty contractor is licensed if that work is essential to accomplish the work in which the contractor is classified. California Code Regulations, title 16, §831. Therefore, the City may permit a Class C-61 licensee to install pre-fabricated playground equipment and any other trade work (e.g., cement or surfacing work) incidental and supplemental to the installation of the pre-fabricated equipment. We note, however, that, because the paving, surfacing or cement work associated with federal and state disabled access requirements (e.g., curb cuts) is independent of the installation of pre-fabricated equipment, such work is not likely to be considered incidental and supplemental to the installation of the pre-fabricated equipment. Consequently, such work should not be performed by a Class C-61 licensee.

III. A vendor is required to have a contractor's license to install playground equipment that becomes a fixed part of the tot lot improvement.

It is a misdemeanor for any person to engage in the business or act in the capacity of a contractor within this state without having a license, unless the person is specifically exempted by statute. Cal. Bus. & Prof. Code §7028. The statutory exemptions from license requirements are set forth in chapter 9, article 3, sections 7040-7054 of the Business and Professions Code. Section 7045 of the Business and Professions Code, which contains the only statutory exemption that is of relevance to this analysis, provides:

This chapter does not apply to the sale or installation of any finished products, materials, or articles of merchandise that do not become a fixed part of the structure, nor shall it apply to a material supplier or manufacturer furnishing finished products, materials, or articles of merchandise who does not install or contract for the installation of those items.

Whether goods installed become a fixed part of the structure is a question of fact, which means analysis on a case by case basis. *Walker v. Thornsberry*, 97 Cal. App. 3d 842, 847 (1979). For example, California courts have held that this exemption applies to the following services: installation of pre-fabricated cold storage units into an existing building (*Costello v. Campbell*, 81 Cal. App. 2d 452 (1947)); carpet installation using a tactless strip method (*Finley-Gordon Carpet Co. v. Bay Shore Homes, Inc.*, 247 Cal. App. 2d 131 (1966)); installation of prefabricated kitchen units, despite the necessity for minor plumbing, electrical, and linoleum work incidental to the fixed units (*E.A. Davis & Co. v. Richards*, 120 Cal. App. 2d 237 (1953)); and assembly of prefabricated restroom pieces and bolting of structure to foundation (*Walker v. Thornsberry*, 97 Cal. App. 3d 842 (1979)). On the other hand, California courts have also held that the exemption does not apply to installation of a sprinkler system, building signs fixed in the ground in concrete, installing frames for batting cages set into concrete, and excavation and construction of baseball park dugouts (*Johnson v. Mattox*, 257 Cal. App. 2d 714, 718 (1968)). In all of the aforementioned cases, the courts focused on (1) whether the pre-fabricated material or product

became a fixed part of the structure and (2) whether the associated trade services were minor and incidental to the installation of the pre-fabricated material.

In light of how courts have historically analyzed the application of the Section 7045 exemption, we believe that typical tot lot improvements will not be exempt from the State Contractors' Licensing Law for the following reasons. First, the plain language of Section 7056, which establishes the Class A license, clearly applies to parks, playgrounds and other recreational works, and associated excavating, grading, trenching, paving and surfacing work, and cement and concrete works. Second, most playground equipment must be fixed to the ground via cement footings after excavation, which has been viewed by courts as a method to install a fixed part of a structure.¹ *See, e.g., Johnson v. Mattox*, 257 Cal. App. 2nd 714, 718 (1968). Third, any paving or cement work necessary to provide disabled access to the tot lot is unlikely to be considered as "incidental and supplemental" to the installation of the playground equipment within the meaning of the California Code of Regulations.

Due to the aforementioned factors, we recommend that PRD continue to require the appropriate Class A or C-61 license for combined design and installation bid packages or, alternatively, advertise procurement and installation bid packages separately.

CONCLUSION

The City may not award a contract for design and construction of a tot lot to an unlicensed vendor if the scope of work entails operations that would require a license (e.g., excavation, grading, trenching, paving and surfacing or cement and concrete works). This rule applies even if the vendor hires licensed subcontractors to complete work for which a license is required. A vendor must have a license to install pre-fabricated playground equipment that becomes a fixed part of the tot lot. Our Office, therefore, recommends that PRD continue to require the appropriate Class A or C-61 license for combined design and installation bid packages or, alternatively, advertise procurement and installation bid packages separately.

CASEY GWINN, City Attorney

By

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¹We note, however, that a contractor's license would not be required to bolt playground equipment into an existing surface.