

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: December 12, 2019

TO: Kristina Peralta, Director of Purchasing and Contracting

FROM: City Attorney

SUBJECT: Requirements and Limitations Governing Communications with a Lobbyist Concerning a Contract to be Competitively Bid

You requested guidance concerning legal requirements and limitations governing a City Official's¹ communications with lobbyists before and during the procurement process of a competitively bid contract. A City Official may meet with lobbyists for competing vendors during an active procurement if they adhere to applicable laws including: (1) San Diego Municipal Code, Chapter 2, Article 7, Division 40 on lobbyists; (2) San Diego Charter (Charter) section 100 on favoritism in public contracts; and (3) California case law relating to fairness in the letting of public contracts.²

I. SAN DIEGO MUNICIPAL CODE CHAPTER 2, ARTICLE 7, DIVISION 40

The San Diego Municipal Code (SDMC), requires any lobbyists wishing to meet with City Officials to register with the City Clerk and file quarterly disclosure reports, the contents of which are described in the SDMC. SDMC §§ 27.4007, 27.4015, and 27.4017.

In addition to registration and quarterly disclosures, there are limits to what a lobbyist may do. Lobbyists may not attempt to place City Officials under personal obligations, must correct any

¹ "City Official" means any of the following officers or employees of the City, which includes all City agencies: elected officeholder; Council staff member; Council Committee Consultant; Council Representative; Assistant City Attorney; Deputy City Attorney; General Counsel; Assistant General Counsel; Chief; Assistant Chief; Deputy Chief; Assistant Deputy Chief; City Treasurer; City Auditor; Assistant City Auditor; City Comptroller; Independent Budget Analyst; Budget/Legislative Analyst; Financial Operations Manager; City Clerk; Labor Relations Manager; Facility Manager; Retirement Administrator; Director; Assistant Director; Deputy Director; Assistant Deputy Director; Chief Executive Officer; Chief Operating Officer; Chief Financial Officer; Chief Investment Officer; Assistant Investment Officer; President; Vice-President; and Assistant Vice President. City Official also means any member of a City Board and any candidate who has been elected to office but not yet sworn in. For purposes of this definition, a candidate is considered elected to office on the date the Council adopts its resolution declaring the results of the election. San Diego Municipal Code § 27.4002, "Definitions."

² California Government Code (Government Code) section 1090, for example, prohibits City Officials from being financially interested in contracts made by them in their official capacity. Courts interpret financial interest very broadly. *People v. Superior Court (Sahlolbei)*, 3 Cal. 5th 230, 239-40 (2017).

misinformation they give, and must not deceive or attempt to deceive any City Official as to any pertinent material facts. SDMC § 27.4023. There are also constraints on gifts³ received from lobbyists to City Officials. Lobbyists may not give a City Official gifts totaling more than ten dollars in value during each calendar month.⁴ SDMC § 27.4030.

II. SAN DIEGO CITY CHARTER SECTION 100

Charter section 100 prohibits favoritism in public contracts. The following portion of Charter section 100 is particularly relevant to lobbying prior to the solicitation of contract bids:

No officer or employee of the City shall favor one bidder over another, by giving or withholding information, or shall willfully mislead any bidder in regard to the character of the material or supplies called for

The penalty is steep: “Any officer or employee found guilty of violation of this Section shall forfeit his position immediately.” San Diego Charter § 100. Additionally, Charter section 101 provides that “[a]ll contracts, agreements or other obligations entered into . . . contrary to the provisions of Section[] . . . 100 . . . may be declared null and void by the Council”

Therefore, City Officials in contact with lobbyists for contract bidders must be careful that their interactions do not result in favoritism towards a particular contractor. For example, a court would likely find it suspect if a City Official agreed to meet with one vendor, but declined to meet with the vendor’s competitor upon request. Not only does favoritism put the City Official’s position at risk, but the City’s operations could be placed in jeopardy should a contract be voided.

III. CALIFORNIA CASE LAW

California courts have consistently held that any deviation from the competitive bid process will receive close judicial scrutiny. While the cases cited below do not involve lobbying, they provide several principles that City Officials should nevertheless keep in mind.

Open bids on government contracts are meant “to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market competition.” *Konica Business Machines U.S.A., Inc. v. The Regents of the University of California*, 206 Cal. App. 3d 449, 456 (1988). Therefore, “[b]ecause of the potential for abuse arising from deviations from strict adherence to [competitive bidding] standards . . . the letting of public contracts universally

³ Gift means any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received, is of equal or greater value. Gifts are subject to the exceptions set forth in Municipal Code section 27.3525. Gifts do not include a ticket, invitation, or other admission privilege to an event held for a non-profit entity. San Diego Municipal Code § 27.4002, “Definitions.”

⁴ City Officials should keep a log of gifts received in a calendar month to avoid inadvertently exceeding this limit.

receives close judicial scrutiny.” *Id.* at 456 (holding that U.C. Regents must set aside a contract award due to a deviation from advertised bid requirements).

These principles were reaffirmed in *Eel River Disposal and Resource Recovery, Inc. v. County of Humboldt*, 221 Cal. App. 4th 209 (2013). In this case, Humboldt County conducted a competitive bid for solid waste disposal services but failed to follow its own competitive bid requirements. *Id.* at 214-20. The court found that Humboldt County deviated from the required bidding process set forth in the request for proposal (RFP) when it awarded the franchise, in part, on the basis that the bidder was locally owned and operated, a bidding criterion not previously disclosed in the RFP. *Id.* at 236 (“the deviations [by Humboldt County] from applicable competitive bidding requirements . . . gave [one bidder] an enormous unfair advantage over other bidders.”) The court went on to note that the mere potential for abuse would have been sufficient to grant relief:

The mere potential for abuses likely to arise from significant deviations from standards designed to eliminate favoritism, fraud, and corruption, avoid misuse of public funds, and stimulate advantageous market place competition is a sufficient basis upon which to grant judicial relief even without a showing that the deviations actually resulted in such abuses. *Id.* at 238.

The court ultimately set aside the deviating bid and granted Eel River’s petition for relief. *Id.* at 239.

In sum, City Officials should be aware that any deviations from the competitive bid process taken to court will receive close judicial scrutiny. A mere potential for abuse could be enough to warrant court intervention. *Id.* at 238-39. Therefore, City Officials should avoid communications with lobbyists for prospective or current contract bidders that create a potential for favoritism, fraud, corruption, a misuse of public funds, or that would hamper market competition.⁵

We also recommend against treating lobbyists different from one another, as this could give the impression of preferential treatment. If, for example, a City Official accepts a meeting with the lobbyists of a certain industry - waste management, for example – the City Official should meet with similarly-situated competitors to avoid the perception of favoritism. City Officials should consider having staff present during these meetings so that there is an observer present.

⁵ Any written communication between City Officials and lobbyists is likely disclosable pursuant to a California Public Records Act request. Cal. Gov’t Code §§ 6250-6276.48.

Honorable Mayor and Councilmembers

December 12, 2019

Page 4

CONCLUSION

City Officials may, but are not required to, meet with lobbyists who have registered and made the proper disclosures according to the SDMC. City Officials must avoid bidder favoritism throughout the competitive bid process in accordance with San Diego Charter section 100, and should keep in mind the general principle of fairness in public contracting.

MARA W. ELLIOTT, City Attorney

By /s/ Laura M. DePoister
Laura M. DePoister
Deputy City Attorney

LMD:hm:sc

Doc. No. 2257423

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cc: Honorable Mayor Kevin Faulconer
Honorable City Councilmembers
Andrea Tevlin, Independent Budget Analyst
Kris Michell, Chief Operating Officer
Ron Villa, Assistant Chief Operating Officer
Aimee Faucett, Chief of Staff, Office of the Mayor