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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Baron E. Perff
Executive Secretary

9-9

May 19, 1992

(Executive Committee--Info.)
(Engineering & Operations Committee--Info.)
(Legal & Claims Committee--Info.)
(Organization & Personnel Committee--Info.)

To: Board of Directors

From: General Counsel

Subject: Contract Preference for Contractors Within Metropolitan's Service Area

Report

I. Introduction

At the May meeting of the Executive Committee, the General Counsel was requested to provide information regarding the legality of providing preferences to contractors within Metropolitan's service area when awarding contracts involving various aspects of the Eastside Reservoir.

The contracts awarded for the Eastside Reservoir will include construction contracts which are generally subject to competitive bidding requirements and professional consulting contracts which are exempt from competitive bidding and may be negotiated.

II. Legal Background

There is a history of buy-American and buy-local preference legislation in numerous states. Such state legislation has been challenged on several grounds: interference with the Commerce Clause of the United States Constitution, inconsistency with international treaty obligations, and inconsistency with lowest responsible bidder legislation. The results of challenges to such legislation have been mixed.

In California, the Legislature has enacted both buy-American and buy-California preference laws. Both laws have been found to be unconstitutional. The Court of Appeal held that California's buy-American statute was unconstitutional in Bethlehem Steel Corp. v. Board of Commissioners (1969) 276 Cal.App.2d 221. The court in Bethlehem Steel held that the statute violated the Commerce Clause of the United States Constitution because the statute directly impacted foreign

trade and unduly interfered with the federal government's exclusive power to govern foreign trade.

Soon after the Bethlehem Steel decision, the California Attorney General concluded that California's buy-California statute was also unconstitutional. The Attorney General reasoned that since the law preferring California businesses affected foreign, as well as out-of-state, commerce, it too constituted "an unconstitutional intrusion into an exclusive federal domain." (53 Ops.Cal.Atty.Gen. 72 (1970).)

However, developments in the law since the Bethlehem Steel decision indicate that a properly phrased preference statute might survive constitutional challenge. Specifically, the federal courts now take the position that states and local public agencies are exempt from challenge under the Commerce Clause when they act as parties to a commercial transaction rather than as regulators. (Hughes v. Alexandria Scrap Corp. (1976) 426 U.S. 794.) Relying on this case law, the Ninth Circuit Court of Appeals recently upheld an Alaska statute giving a 7 percent bidding preference to Alaska milk harvesters. That statute had been used by a local school district in awarding a contract to supply milk for the district. (Big Country Foods, Inc. v. Board of Education (1992) 952 F.2d 1173.)

The preference statutes that have been upheld by the courts in recent years are of a more limited scope than the previously challenged California statutes, both of which provided absolute preferences. Recent preference statutes generally provide a limited percentage bidding preference to the preferred businesses. Such statutes avoid preferences where the cost of contracting with the local business is unreasonable in comparison with the non-preferred businesses. Recent preference statutes also provide discretion to the awarding public entity if contracting with the preferred local business is otherwise inconsistent with the public interest.

However, even assuming the constitutionality of limited preferences, at least as to competitively bid contracts, the issue remains as to whether a local preference policy implemented by Metropolitan would conflict with lowest responsible bidder requirements. State law requires that competitively bid contracts be awarded by Metropolitan to the lowest responsible bidder. (Pub. Contract Code, § 21565.) Thus, without statutory authority, a Board policy providing a preference to local contractors who are not the lowest responsible bidders would violate this statutory directive.

There are certain statutory exceptions to the lowest responsible bidder requirement. For instance, there is a limited statutory exception aimed at fostering affirmative action with regard to minority- and women-owned enterprises. (Pub. Contract Code, § 2000.) That statute provides that, notwithstanding any lowest responsible bidder statute, any local agency may require that a contract be awarded to the lowest responsible bidder who also meets certain minority- and women-owned enterprise requirements.

Currently, there are a variety of preference bills being considered by the state Legislature. A list of these bills and their current status is attached hereto as Appendix A. While none of the pending bills provide local preferences, some provide for California preferences.

III. Impact on Metropolitan's Contract Practices

A. Competitively Bid Contracts

In the absence of legislation providing a preference exception to the lowest responsible bidder requirement, it does not appear that the Board could legally implement a local contractor preference for competitively bid contracts, because such a preference would run counter to the lowest responsible bidder statute. As evidenced by the current bills being considered by the California Legislature, any future legislation will probably provide preferences for California businesses and not for businesses within a local agency's boundaries.

In addition, any such legislation allowing buy-California or buy-local preferences is likely to be challenged in court. Given the current state of the law, it cannot be stated with certainty that such legislation would be found to be constitutional.

B. Negotiated Contracts

To the extent that contracts awarded by Metropolitan are exempt from the lowest responsible bidder requirements, Metropolitan may have the ability to prefer local contractors.

The statutory lowest responsible bidder requirement does not apply to the award of certain contracts, such as professional consulting contracts. Thus, to the extent that the lowest responsible bidder requirement does not apply to contracts awarded by Metropolitan, that statutory requirement

will not impede Metropolitan from providing preferences to local contractors.

However, the constitutional issues raised by the providing of preferences, as discussed above, are equally applicable to negotiated contracts. Absent definitive case law, questions as to the constitutionality of any preference policy, including one applying to negotiated contracts, remain.

Board Committee Assignments

This letter is referred for information to:

The Executive Committee because of its authority to study, advise and make recommendations with regard to policies and procedures to be considered by the Board, pursuant to Administrative Code Section 2417(e);

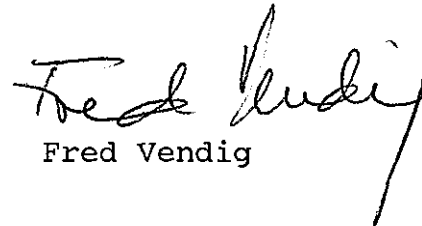
The Engineering and Operations Committee because of its authority to study, advise and make recommendations with regard to plans, specifications and bids, and with regard to the initiation, scheduling, contracting and performance of construction programs and work, pursuant to Administrative Code Section 2431(a) and (b);

The Legal and Claims Committee because of its authority to study, advise and make recommendations with regard to policy considerations concerning District contracts, pursuant to Administrative Code Section 2461(d); and

The Organization and Personnel Committee because of its authority to study, advise and make recommendations with regard to the terms and conditions of employment of all consultants, pursuant to Administrative Code Section 2471(g).

Recommendation

For information only.


Fred Vendig

RAC:jh
bdpref.
Attn.

APPENDIX A

BILLS REGARDING CONTRACT PREFERENCES

<u>Bill</u>	<u>Summary</u>	<u>Status</u>
AB 2829	Bill originally required all public entities to provide unspecified bidding preferences to California companies. However, after amendment, bill only requires state agencies to report on the award of their contracts to "non-California based" companies. As currently worded, would not apply to Metropolitan.	Senate--Senate Rules Committee
AB 3470	Requires state and county agencies to provide a 10 percent preference to certain recycled products made within California and a 5 percent preference to certain recycled products made outside of California. As currently worded, would not apply to Metropolitan.	Assembly--Ways & Means Committee
AB 3235	Requires any public entity awarding a contract involving the expenditure of state funds to provide a preference to vendors that encourage the retention of business, employment and tax revenues within the State of California.	Assembly--Committee on Utilities & Commerce

Bills

Summary

Status

AB 845

Requires public agencies awarding contracts of \$100,000 or more to provide a 7 percent bid reduction to California companies and 5 percent bid reduction to U.S. companies. If the bid of a California or U.S. bidder with the contract bid reduction is lower than the lowest qualified bid of a bidder not receiving a reduction, the lowest California or U.S. bidder shall be offered the contract at the lowest qualified bid amount without regard to a contract bid reduction.

Senate--Committee on Governmental Reorganization

AB 388

Requires that 50 percent of total worker hours performed in each craft, classification or type of work on a public works contract be performed by California residents.

Senate--Third Reading, will go to Senate Floor

AB 2578

Requires that all public agency contracts funded from proceeds of any state bond act provide a 5 percent bidding preference to a California company, if the company is not otherwise entitled to a preference.

Assembly--Committee on Banking, Finance & Bonded Indebtedness

SB 739

Requires that at least 50 percent of total worker hours performed in each type of work on a public works contract be performed by California residents.

Assembly--Ways & Means Committee Suspense File

SB 1945

Prohibits any public entity from entering into a contract exceeding \$100,000 for purchase of goods or services from a foreign country.

Senate--Committee on Governmental Organization