City of Loma Linda Official Report

Floyd Petersen, Mayor
Stan Brauer, Mayor pro tempore
Robert Christman, Councilmember
Robert Zipnick, Councilmember
Charles Umeda, Councilmember

COUNCIL AGENDA: August 23, 2005

TO: City Council

VIA: Dennis R. Halloway, City Manager

FROM: W. James Hettrick, Director of Information Systems and T. Jarb Thaipejr, Public Works Director/City Engineer

SUBJECT: AWARD OF CONTRACT FOR LOMA LINDA CONNECTED COMMUNITY FIBER OPTIC CONDUIT AT RICHARDSON STREET, ORANGE GROVE AVENUE AND ACADEMY AVENUE.

RECOMMENDATION:

It is recommended that the City Council award the contract for the implementation of the Loma Linda Connected Community Fiber Optic Backbone the above subject project to John Griffin Construction, Inc. of Corona, CA in the amount of $72,512.00.

BACKGROUND:

The Loma Linda Connected Community Program (LLCCP) requires that all new development and additions which exceed 50 percent of the original structure and are located within the Fiber-Optic Master Plan Area comply with the Program requirements. The purpose of the Program is to provide Loma Linda business and residents with opportunities for voice, data, video, multimedia, home automation systems, environmental control, security, audio, television, sensors, alarms, and intercom. The Program document describes and establishes the standardized requirements for residential and commercial telecommunications cabling systems. The initial intent is to connect new development but the long-term goal is to eventually retrofit the entire community.

ANALYSIS:

It has been determined that it is in the best interest of the City to install LLCCP conduit in conjunction with street improvement projects. There are two street improvement projects scheduled to be constructed. Orange Grove Street and Academy Avenue from Van Leuven Street to Anderson Street, which is within the proposed LLCCP network, will be repaired and improved. Richardson Street, which connects to the City well site, will receive a similar treatment. John Griffin Construction has been awarded the contract to install LLCCP conduit for the City. Staff has negotiated with this contractor to add this work to his contract.

AGENDA ITEM 13

ENVIROMENTAL:

The project to install fiber optic in street right-of-ways is exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15061(3). This provision states that an activity is covered by the General Rule that CEQA only applies to projects that have the potential for causing a significant effect on the environment. In situations where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. The project at hand will extend a utility that is new to the City; however, the utility is not growth inducing in that it will not provide necessary services to raw or vacant lands that will allow new development to occur. The construction impacts of installing the fiber optic in the Civic Center and specified right-of-ways are not significant in that they are short term. The contractor will be required to comply with all applicable City regulations for traffic control and safety, and day time hours of construction.

FINANCIAL IMPACT:

Funding will be provided from account no. 40-5900-8500.

Attachments:

Best Best & Krieger, LLP Memo

August 31, 2004

TO: HON. MAYOR AND CITY COUNCIL

FROM: GREGORY POWERS, SPECIAL COUNSEL
JAMES HETTRICK, DIRECTOR OF INFORMATION SYSTEMS

RE: THE CITY'S ABILITY TO "SOLE SOURCE" THE MATERIALS AND/OR INSTALLATION OF ITS FIBER-OPTIC NETWORK FOR THE "CONNECTED COMMUNITY PROGRAM"

Regarding the City's ability to purchase materials and/or installation services for its fiber-optic backbone network for the Connected Community Program ("Program") from a "sole source," below please find a brief discussion on the law pertaining to this issue, and the facts as they pertain to the materials and installation for the Program. It appears, based on the facts and the law as it currently stands, the City may sole-source the purchase of materials and/or installation of its backbone network while fully complying with State bidding laws.

As a general rule, competitive bidding is required for public entities as provided by statute, charter, and/or ordinance. (*Graydon v. Pasadena Redevelopment Agency et al.*, (1980) 104 Cal.App.3d 631, 635-636.) The policies supporting public bidding requirements include guarding against favoritism, improvidence, extravagance, fraud and corruption, as well as preventing waste of public funds and ensuring the public obtains the best economic result. (*Id* at 636.)

However, bidding laws are to be construed fairly and reasonably, "with sole reference to the public interest and in light of the purposes to be accomplished." (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, (1972) 7 Cal.3d 861.) Hence, there are several exceptions to the rules regarding public bidding, including where the nature of the contract is such that competitive bids would be unavailing or would not produce an advantage, and the advertisement for competitive bids would thus be undesirable or impractical. (*Id*; see also *Meakin v. Steveland, Inc.*, (1977) 68 Cal.App.3d 490; *County of Riverside v. Whitlock*, (1972) 22 Cal.App.3d 863.) It has been held that where competitive bids work an incongruity or do not produce any advantage, they should not be required. (*Graydon v. Pasadena Redevelopment Agency, et al.*, 104 Cal.App.3d 631 at 636.)

The principle that bidding should not be required where no advantage to the City would result has been applied in California in a variety of situations involving both the purchase of services and products, and the construction of public improvements and buildings where it has appeared that competitive bidding would be incongruous or would not result in the greatest public benefit. (*Id.*) It has also been applied where governmental entities have entered into contracts for personal services depending on a particular skill or ability. (*Kennedy v. Ross*, (1946) 28 Cal.2d 569, holding that competitive bidding was not necessary for contracts for the purchase of patented products; *Hodgeman v. City of San Diego*, (1942) 53 Cal.App.2d 610, holding no competitive bidding was necessary where contracting for construction services on public improvements by a government regulated monopoly; and *County of Riverside v. Whitlock*,

supra, 22 Cal.App.3d 863, holding that no competitive bidding was necessary for contracts for experimental or unique products and/or services.)

In addition to the foregoing, courts have recognized that, due to rapidly changing technologies in the market, public bidding requirements may not best serve the public interest when applied to the purchase of telecommunications equipment. (*San Diego Service Authority for Freeway Emergencies, et al. v. The Superior Court of San Diego County,* (1988) 198 Cal.App.3d 1466, 1470.) "In these areas of specialized equipment and rapid technological changes ... competitive bidding may not ultimately be cost effective or in the public interest." (*Id.*)

Sole-sourcing is likely necessary for the purchase of materials and installation of equipment for the Program due to the fact that the warranties for millions of dollars of equipment already purchased for the Program will only be honored by the equipment manufacturers if installation is conducted by service providers which have three specific certifications, and only one company in California has all three certifications. By pursuing competitive bidding for the installation of such equipment, the low bidder may not have all three necessary certifications. This places the City in a quandary, and would likely be found to be "unavailing," "impractical," and "incongruous" to the goal of the project.

With regard to sole sourcing telecommunications equipment by limiting the equipment to a particular brand, generally State law disfavors public entities from designating materials by brand name in their specifications and bid documents. (Public Contract Code sec. 3400.) State law provides, in pertinent part, the following:

> "(a) No agency of the state, nor any political subdivision, municipal corporation, or district ... shall draft or cause to be drafted specifications for bids, in connection with construction ... of public works, (1) in a manner that limits the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words "or equal" so that bidders may furnish any equal material, product, thing, or service. In applying this section, the specifying agency shall, if aware of an equal product manufactured in this state, name that product in the specification."

However, with regard to the installation of fiber-optic equipment for the Program, an exception applies to this rule. Specifically, Public Contract Code sec. 3400(b)(2) and (3) provide the following exception in pertinent part to the above rule:

> "(b) Subdivision (a) is not applicable if the awarding authority ... makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade

> name for any of the following purposes: ...(2) In order to match other products in use on a particular public improvement either completed or in the course of completion. (3) In order to obtain a necessary item that is only available from one source."

Based on these exceptions, the City may legally designate fiber-optic materials by trade name, and without also allowing for "or equal" materials, in its specifications and bid documents in order to match other products which are in the course of completion on the Program. Particularly with regard to fiber-optics, concerns such as equipment compatibility appear to be unique in that failure to have matching leads, color-coding, etc., between two or more products can lead to major project complications, and in some cases complete removal and re-installation, which would likely result in drastic cost additions to the project and thereby not meet the spirit of State and local bidding laws.

Lastly, the Loma Linda Municipal Code ("L.L.M.C.") does not prevent the City from dispensing with competitive bidding and sole sourcing the contracts for materials and/or services for fiber-optic network installation. L.L.M.C. sec. 3.32.260 provides the following, in pertinent part, with regard to dispensing with competitive bidding:

> "Procedures and requirements for formal and informal competitive bidding may be dispensed with in any of the following circumstances: (A) The commodity can be obtained from only one vendor or source..."

Based on the language of the ordinance, competitive bidding may be dispensed with in any of the circumstances provided, and the ordinance provides five separate scenarios under which public bidding is not required. (*Id.*) However, the ordinance does not *limit* it to those five scenarios, as indicated by use of the word "any" instead of "only" in the first sentence. For instance, if the ordinance stated, "procedures and requirements for formal and informal competitive bidding may be dispensed with in *only* the following circumstances," there would be a local legislative intent evidenced that competitive bidding could only be avoided if one or more of the listed exceptions were met. However, by use of the word "any," it appears that the list of scenarios is provided as a guidance tool, and not a restrictive mechanism.

CONCLUSIONS

Based on the law and the facts as they exist in the City with regard to the Program, the City can dispense with competitive bidding for fiber-optic equipment and/or services needed for the installation of the backbone network for the "Connected Community Program" and remain in compliance with State bidding laws. The justifications for sole-sourcing include, but are not limited to, the need (1) to match existing facilities, (2) to maintain product warranties, and (3) for uniformity in construction and installation of the fiber-optic network.

Due to the unique nature of the goods and services required, as well as the fact that bidding would likely be unavailing, not produce an advantage to the City (but would rather

result in a disadvantage to the City due to the warranty issue and need to match existing unique materials and facilities), and the fact that only one contractor in California meets the three certification requirements of the manufacturer in honoring the warranties of the materials, sole-sourcing appears to be in conformance with the law and facts as they apply to the Program.