

Memorandum

TO: Mr. Brian Cullen
Pacific Environmental Resources Corporation
FROM: Charles E. Schwenck
DATE: July 16, 2007
RE: Santa Paula WRF Project

As requested, the following are my comments regarding the “Design-Build-Operate-Finance” (“DBOF”) agenda item for tonight’s meeting of the City Council of the City of Santa Paula insofar as it relates to compliance with California statutory requirements for the letting of such contracts:

A. Statutory authority for DBOF

To my knowledge, there are only two California statutes authorizing the “privatization” of wastewater recovery facilities (“WRFs”) whereby a third party would build, finance, own and operate such facility and provide service to a municipality:

1. The Local Government Privatization Act of 1985 (Sections 54250 – 54256 of the Governmental Code (the “Act”). We are aware of several attempts in the 1980s to let DBOF contracts under this Act. None of them were, to our knowledge, successful. There are simply too many ambiguities in the Act, the municipality is not exempted from compliance of Public Contract Code requirements, and the Act’s requirements that, for example, the contract be adopted by an ordinance which is subject to (i) referendum and (ii) approval of the Public Utilities Commission make it unduly burdensome; and

2. Section 5956 et. seq. of the Government Code (“5956”), enacted in 1996 to streamline the privatization process, which is now the preferred – to our knowledge, the only viable – process for letting a DBOF contract.

Therefore, we assume that the City intends to comply with 5956.

B. Requirements of 5956

As we have discussed, the agenda item proposes, among other things, in serial fashion a contract to write a Request for Qualifications (“RFQ”) (and, presumably, a follow-on Request for

Proposal (“RFP”)); issuing the RFQ; issuing an RFP based on response to the RFQ; and letting the DBOF contract. This will take several months, thereby potentially jeopardizing the ability of the City to meet certain environmental compliance deadlines. Such a process is not required by 5956.

1. No RFQ is Required

RFQs are most commonly used in procurement of professional service under the Public Contract Code, wherein professional competence, rather than price, is the primary criterion for selection. Although the section in 5956 which deals with contractor selection process (Section 5956.5) requires that the process “utilize, as the primary section criteria (sic.), the demonstrated competence and qualifications for [the contracted responsibilities]”, it does not require an RFQ. In fact, Section 5956.5 specifically provides that, except for certain provisions relating solely to (a) conflicts of interest and other unlawful conduct of government employees and (b) security for construction and completion of the facility, “the government agency soliciting proposals is not subject to any other provisions of the Public Contract Code or this [Government] code that relates (sic.) to public procurements.”

Further, we are aware of numerous RFPs for DBOF contracts pursuant to 5956 which were not preceded by an RFQ. (See the County of Sacramento’s 2005 Keiffer Landfill RFP for a recent example.)

2. Not even an RFP is required: “Competitive negotiation” suffices.

Section 5956.5 requires that the contractor be selected pursuant to a “competitive negotiation” process. In addition to the aforementioned removal of the process from the procedural requirements of the Public Contract Code, that section specifically provides that “The Competitive negotiation process shall not require competitive bidding.” No formal RFP process is required.

3. The “Competitive negotiation” requirements are minimal.

In addition to the aforementioned requirements that (a) competence, rather than price, be the primary selection criterion; (b) the provisions of the Public Contract Code dealing with (i) conflicts of interest and (ii) completion security be incorporated into the selection criteria; and (c) “competitive negotiation” be employed, the only other procedural requirement is that “the selection criteria shall also ensure that the facility be operated at fair and reasonable prices to the user of the infrastructure facility services.”

There is no California statutory definition of “competitive negotiation”.¹ The term is used in general negotiation literature to refer to a particular style of negotiation between two parties,

¹ There are definitions in the Public Contract Code. (See, e.g., Sections 20216, 20217 and 20323) However, they each contemplate a procurement process entirely different than that contemplated by 5956 and are rendered inapplicable to the 5956 process by (a) the Legislature’s failure to use a capitalized or otherwise defined term and (b) the aforementioned provisions specifically rendering the Public Contract Code (with very limited, specific exceptions) inapplicable.

To: Mr. Brian Cullen
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Page 3

rather than simultaneous negotiation by one party with more than one potential contractor.² It is also used in numerous privatization statutes in other states (e.g., Virginia and Kentucky, to name a few), wherein authority can be found both (a) for a preference that there be more than one potential contractor and (b) for the absence of such requirement. (None of such authority is binding on the City.)

Nor does it follow from the aforementioned “fair and reasonable prices” criterion that more than one potential contractor is required by 5956. For example, this criterion could be met by the comparison of a single contractor’s price to the cost that the contracting agency would incur by providing the facility and services – which costs would be “avoided” by contracting with a private entity for such facility and services. This “avoided cost” approach is the one used, for example, in the determining “just, fair and reasonable” prices in the procurement of electricity by public utilities from private providers under the Public Utility Regulatory Policies Act of 1978 and the federal regulations thereunder. (See, e.g., 18 C.F.R. Sections 292.302 et. seq.)

None of this is to say that the City may not use a formal RFQ/RFP process if it so chooses. However, the City is free not to use such a process, provided only that it engages in a “competitive negotiation” process which incorporates the few specific requirements of 5956. Following the latter path can save the City several months and substantial expense while still assuring that the DBOF alternative for its WRF facility is provide by a competent and qualified contractor, at a fair and reasonable prices, and in accordance with all applicable laws and regulations.

² Sec., e.g., Changeingminds.org at “Competitive Negotiation”.