BUDGET SEP 2 4 2008 #4

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

REPORT TO BUDGET AND FINANCE COMMITTEE

APPLICATION OF PUBLIC RECORDS ACT TO CONTRACTORS

INTRODUCTION

On July 28, 2008, the City Council considered Item Number 151, amendments to the City's Managed Competition Ordinance, sections 22.3701 *et seq.* of the San Diego Municipal Code, and related items. In considering those items, the City Council considered and passed a motion directing the Office of the City Attorney to come back with recommendations about the appropriate disclosure requirements for private interests that obtain contracts. This report summarizes the recommendations of the City Attorney's Office in response to the Council's request. Our recommendation is to apply the proposed ordinance to all contracts by private contractors.

DISCUSSION

The attached Ordinance would add a section at the end of Chapter 2, Article 2, Division 30 of the Municipal Code, which provides general definitions and provisions applicable to all types of City contracts. The new section would make City contractors subject to the same document disclosure requirements that would apply if they were City agencies. This would apply to public works contracts under Division 31 and contracts for "personal services, goods, and consultants" under Division 32, and expressly includes future contracts procured through Managed Competition.

Contractors' disclosure requirements pursuant to this Ordinance would be the same as those applicable to a "local agency" as that term is defined in the California Public Records Act, Cal. Gov't Code sections 6250 *et seq.* The same exemptions that apply to government agencies, as set forth in the Public Records Act and in case law thereunder, would apply to City contractors subject to this Ordinance. The Ordinance would explicitly state that it would reach only documents related to the performance of the contract, and not internal documents related only to the contractor's efforts to procure the contract. However, if the contractor later sought an amendment to the contract, which most typically involves a request to authorize additional funds, then the public would be allowed to view contractor documents related to the amendment and the justifications for it, potentially including documents related to the original procurement, if they later became relevant to the amendment.

City contracts would be required to include a standard clause, drafted by the Office of the City Attorney, under which the contractor would accept the obligations imposed by the new Ordinance. In addition, the contractor would agree to allow the City access to its internal records to the extent reasonably necessary to ensure compliance, and would agree to indemnify and hold harmless the City in any suits seeking documents under this Ordinance. The Ordinance would apply to all contracts executed, awarded, or amended on or after January 1, 2009.

CONCLUSION

The Office of the City Attorney stands ready to provide any further assistance that the Council may need in this matter.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

MPC:sc
RC-2008-20

ATTACHMENT

CITY ATTORNEY DIGEST

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

EFFECTIVE DATE _____

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO AMENDING CHAPTER 2, ARTICLE 2, DIVISION 30 BY CREATING A NEW SECTION 22.3038, REQURIING CONTRACT DOCUMENTS TO BE SUBJECT TO PUBLIC RECORDS ACT.

This ordinance makes changes to Chapter 2, Article 2 of the City of San Diego Municipal Code relating to City contracts by adding section 22.3038.

This addition provides that those contracting with the City to under public works contract, goods and services contracts, and consultant contracts, including contracts procured pursuant to the City's Managed Competition program under section 117(c) of the City Charter, must disclose internal documents related to performance of the contract, and to any requests for amendments to the contract, to the same extent and in the same manner as a public entity. The new section also requires City contracts to contain a clause imposing these obligations on contractor, provides for enforcement by the City, and requires the contractor to bear any legal costs connected with a challenge for failure to provide such documents.

This ordinance contains a notice that a full reading of this ordinance is dispensed with prior to its final passage, since a written or printed copy will be available to the City Council and the public a day prior to its final passage.

This ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

ATTACHMENT

A complete copy of the Ordinance is available for inspection in the Office of the City Clerk of the City of San Diego, 2nd Floor, City Administration Building, 202 C Street, San Diego, CA 92101.

MPC:sc
09/18/08
Or.Dept: Council
O-2009-26

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO AMENDING CHAPTER 2, ARTICLE 2, DIVISION 30 BY CREATING A NEW SECTION 22.3038, RELATING TO CONTRACT DOCUMENTS SUBJECT TO PUBLIC RECORDS ACT.

WHEREAS, City contractors, under the California Public Records Act, may not always be required to disclose to the public documents related to their performance of City contracts; and

WHEREAS, the Council finds that the public nature of services provided to the City by City contractors requires that the public have access to documents related to those services, in the same manner as if the services were being provided by City employees; and

WHEREAS, the Office of the City Attorney, pursuant to a request of the City Council by Motion on July 28, 2008, has recommend an amendment to the San Diego Municipal Code requiring City contractors to provide public access to documents related to City contracts; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 2, Division 30 of the San Diego Municipal Code is amended by adding a new section 22.3038, as set forth herein.

§22.3038 Contract Documents Subject to Public Records Act

(a) Except as provided in subsection (b), all documents prepared, owned, used, or retained by any City contractor, *public works* contractor, or *consultant* in performance of an agreement with the City, including any agreement procured through the City's Managed Competition Program pursuant to section 117(c) of the City Charter, shall be made available to the public, through the City's contract administrator or other designated representative upon request of any party under the California Public Records Act, to the same extent and in the same manner as if the contractor, *public works* contractor, or *consultant* were a "local agency" as that term is used in the California Public Records Act.

(b) Notwithstanding the foregoing, no contractor, *public works* contractor, or *consultant* shall be required to produce, in response to a request under this section, records and information that would be exempt from disclosure if the contractor, *public works* contractor, or *consultant* were a local agency.

(c) All city *contracts*, *public works contracts*, and *consultant* agreements shall contain a clause, approved by the Office of the City Attorney and applied uniformly to all such agreements, under which the contractor, *public works* contractor, or *consultant* acknowledges and accepts the obligation to make documents and records available to the public pursuant to this section, agrees to permit the City to inspect its records in whatever manner may be reasonably necessary to ensure compliance with this section, and agrees to indemnify and hold harmless the City in any dispute or litigation arising from any refusal or delay in providing such records. Such clause shall be included in all *contracts*, *public works contracts*, and *consultant* agreements executed, *awarded*, or amended on or after January 1, 2009.

(d) This section is intended only to require the disclosure of information related to performance of the *contract*, *public works contract*, or *consultant* agreement with the City, and shall not be construed to require the disclosure of information that is:

(1) prepared, owned, used, or retained solely by a private entity; and
(2) solely related to:

(A) a private entity's efforts to obtain such a *contract*, *public works contract*, or *consultant* agreement, unless an amendment to the agreement is proposed and the records requested relate to the justification for the amendment or, to the extent related to the amendment, justification for the original *award*; or

(B) any negotiations with the City or any disputes with the City.

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By _____
Michael Calabrese
Chief Deputy City Attorney

MPC:sc
09/18/08
Or.Dept: Council
O- 2009-26

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By_____
Deputy City Clerk

Approved: _____
(date)

_____
JERRY SANDERS, Mayor

Vetoed: _____
(date)

_____
JERRY SANDERS, Mayor

ATTACHMENT

STRIKEOUT ORDINANCE

OLD LANGUAGE: ~~STRIKEOUT~~
NEW LANGUAGE: UNDERLINE

ORDINANCE NUMBER R-_____

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO AMENDING CHAPTER 2, ARTICLE 2, DIVISION 30 BY CREATING A NEW SECTION 22.3038, RELATING TO CONTRACT DOCUMENTS SUBJECT TO PUBLIC RECORDS ACT.

§22.3038 Contract Documents Subject to Public Records Act

(a) Except as provided in subsection (b), all documents prepared, owned, used, or retained by any City contractor, *public works* contractor, or *consultant* in performance of an agreement with the City, including any agreement procured through the City's Managed Competition Program pursuant to section 117(c) of the City Charter, shall be made available to the public, through the City's contract administrator or other designated representative upon request of any party under the California Public Records Act, to the same extent and in the same manner as if the contractor, *public works* contractor, or *consultant* were a "local agency" as that term is used in the California Public Records Act.

(b) Notwithstanding the foregoing, no contractor, *public works* contractor, or *consultant* shall be required to produce, in response to a request under this section, records and information that would be exempt from disclosure if the contractor, *public works* contractor, or *consultant* were a local agency.

(c) All city *contracts*, *public works contracts*, and *consultant* agreements shall contain a clause, approved by the Office of the City Attorney and applied uniformly to such agreements, under which the contractor, *public works* contractor, or *consultant* acknowledges and accepts the obligation to make documents and records available to the public pursuant to this section, agrees to permit the City to inspect its records in whatever manner may be reasonably necessary to ensure compliance with this section, and agrees to indemnify and hold harmless the City in any dispute or litigation arising from any refusal or delay in providing such records. Such clause shall be included in all *contracts*, *public works contracts*, and *consultant* agreements executed, awarded, or amended on or after January 1, 2009.

(d) This section is intended only to require the disclosure of information related to performance of the *contract, public works contract*, or *consultant* agreement with the City, and shall not be construed to require the disclosure of information that is:

(1) prepared, owned, used, or retained solely by a private entity; and
(2) solely related to:

(A) a private entity's efforts to obtain such a *contract, public works contract*, or *consultant* agreement, unless an amendment to the agreement is proposed and the records requested relate to the justification for the amendment or, to the extent related to the amendment, justification for the original *award*; or

(B) any negotiations with the City or any disputes with the City.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By _____
Michael Calabrese
Chief Deputy City Attorney

MPC:sc
09/18/08
Or.Dept: Council
O- 2009-26

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By_____
Deputy City Clerk

Approved: _____
(date)

_____
JERRY SANDERS, Mayor

Vetoed: _____
(date)

_____
JERRY SANDERS, Mayor

ATTACHMENT