City of Peoria • 8401 West Monroe Street • Peoria, Arizona 85345

OFFICE OF THE CITY ATTORNEY

CIVIL	602-412-7330
PROSECUTOR	602-412-7335
FACSIMILE	602-412-7043

OPINION NO. 95-05

TO: Ken C. Forgia, Mayor
Kevin Kadlec, Public Services Director

FROM: Stephen M. Kemp, City Attorney

DATE: February 14, 1995

SUBJECT: Public Works Contracting

QUESTION:

You have both asked: Must the City competitively bid a contract for street repair that is being performed by a contractor using infrared equipment that is designed to remove, heat and reinstall asphalt.

OPINION:

For purposes of this Opinion, I have provided some background information. The City has been approached by a company that manufactures equipment that removes, heats and reinstalls asphalt. The proposal from the company would have the City contract for a demonstration project to reconstruct the streets in two subdivisions of the City. The benefit to the City is that the cost to reconstruct the streets through rehabilitation of the existing asphalt pavement is less than the cost to remove the existing pavement and install new.

Public Works contracts are governed by three separate provisions, the Peoria City Charter, the City Code and the provisions of A.R.S. §34-101, the Arizona Public Works Law. The City Charter provides in Article VIII, Sec. 2:

Sec. 2.Contracts for improvements, services and purchases.

A. Any equipment, material or supplies to be purchased, or services to be obtained for or on behalf of the City, or contract to be awarded for any City improvements, shall be awarded under such rules, regulations and ordinances as the City Council may adopt.

In 1991, the City adopted a Procurement Code to govern such purchases. The scope of the Procurement Code is outlined in Section 2-304.[1] It should be noted that in the event of a conflict between the Code and Title 34, Arizona Revised Statutes, the State law governs. This is based on the specific intent of the legislature to preempt all cities from adopting their own contracting standards. See, Smith v. Graham County Community College District, 123 Ariz. 431, 600 P.2d 44 (App. 1979)

The City Code does provide for sole source procurement.[2] However, it must be demonstrated that the item or service sought is capable

---

[1]The text of the city code provides:

Sec. 2-304. Scope.
This code shall apply as follows:
(a) All procurement initiated after the effective date of its adoption by the mayor and council.
(b) To every expenditure of public monies, including federal assistance monies by this city acting through a city governmental unit, as defined in this code, unless otherwise specified in this code. This code also applies to the inventory and disposal of city materials. Nothing in this code or in regulations promulgated under this code shall prevent any city governmental unit from complying with the terms and conditions of any grant, gift, bequest or cooperative agreement.
(c) This code does not apply to contracts between this city and other political subdivisions of the State of Arizona, except as provided in this code.
(d) This code is not applicable to contracts for expert services if the purposes of such services is to provide for professional services relating to an existing or probable lawsuit in which this city is or may become a party or to contract for special investigative services for law enforcement purposes.
(e) In the event of a conflict between the provisions of this code and the provisions of Title 34, Arizona Revised Statutes, the provisions of Title 34 shall govern.
(f) This code does not apply to agreements negotiated by legal counsel representing the city in settlement of litigation or threatened litigation.

[2]Sec. 2-317. Sole Source Procurement.
(a) The materials manager may procure and contract for supplies and services without compliance with the procedures set forth in sections of this code when there has been a written determination that competition is not available and there is only one (1) known source for the supply or service.
(b) The agency requesting a sole source procurement shall provide a written determination, in such manner and on such form as the materials manager shall prescribe, justifying the basis for the sole source procurement.
(c) A sole source procurement request which exceeds fifteen thousand dollars ($15,000.00) Shall be submitted in writing to and limited to the approval of the city council.

of being obtained from a single vendor. It is my understanding that other manufacturers of pavement rehabilitation equipment exist. Their processes may not be as favorable as the one from whom the City received a response. Such factors are meant to be evaluated in the competitive bid process.

Under Title 34, Arizona Revised Statutes all public works projects must be competitively bid.[3] The statute does provide an exception for public agencies to perform the work with their own employees for those projects that do not exceed $150,000.[4] While the statute makes reference to structures and buildings, the Arizona Supreme Court has held that structures include streets and road construction. See, Achen-Gardner, Inc. v. Superior Court in and for County of Maricopa, 173 Ariz. 48, 839 P.2d 1093 (1992)

The statute does not create any exceptions for demonstration or test projects. A limited exception exists for certain public buildings constructed pursuant to a Development Agreement. Therefore it must be concluded that the reconstruction of the streets in the two subdivisions must be competitively bid to comply with the provisions of A.R.S. §34-201, et.seq.

However, this does not foreclose the City from electing to include in its bid specifications a requirement that a pavement recycling process consisting on pavement removal, reheating the existing asphalt and reusing the asphalt be used. Title 34, Arizona Revised Statute only requires competitive bidding based on specifications prepared by an architect or engineer.

The only restriction upon the specifications is one of commercial reasonableness. This means that the specifications must be written in such a manner to be fair to all bidders and provide for specific designated items, only when justifiable basis exists.[5] The City need only be commercially reasonable, recognizing its fiduciary duty to the citizens to obtain the best and most favorable bid to the City.

Therefore, it is our opinion as follows:

1. A contract for reconstruction of City streets using a heated asphalt removal and recycling process must be competitively

---

[3] See, A.R.S. §34-201.B

[4] See, A.R.S. §34-201.D.

[5] For example, it would be improper to require that all bidders on this project must use vehicles with an International Diesel Engine. Clearly, there are other commercial diesel engines manufactured by other companies that would be suitable.

bid.

2. The City may draft and adopt bid specifications that require interested bidders to submit bids for a heated asphalt removal and recycling process.

If you should have any questions, please do not hesitate to contact me.

cc: Honorable Mayor and Council

SMK\OPINION\95-05