

CITY OF OAKLAND
CITY ATTORNEY'S OFFICE

MEMORANDUM

TO: Danny Wan
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FROM: Doryanna Moreno

DATE: February 4, 2003

RE: **Community Funding Organizations' Role in Public Works of Improvement**

The purpose of this memo is to identify contracting options for the City and Community Funding Organizations ("CFOs") to undertake public works of improvement on City-owned property.

To meet state contractor licensing requirements and state due diligence requirements for construction payment bonds, the City must execute construction contracts directly with licensed contractors (usually a prime contractor). Contracts for public works of improvement with unlicensed developer CFOs that propose to deliver licensed work via subcontracts would violate the contractor license laws and bond laws.¹

The City can, however, delegate a role in project development and/or construction to CFOs as follows:

- 1) City can limit CFO role to work that does not require a contractor license, such as:
 - a) Project management – see attached sample of duties; or
 - b) Architect/design work (CFO must assign contract rights to City to assure claims on errors and omissions policy); or
 - c) Civil engineer inspections (CFO must assign contract rights to City to assure claims on errors and omissions policy); or
- 2) City, CFO and licensed prime contractor can execute joint construction agreements, with City responsible for actual hiring of licensed contractor and approval and acceptance of work and CFO responsible for payment (when grants are allocated to CFO) and project management; or
- 3) City can contract CFO to perform construction work if CFO becomes a state-registered licensed contractor, in its own name or as a joint venture entity; or
- 4) If CFO is conducting or will conduct programs on City property, CFO should have or establish a property interest via a lease under which it can undertake construction to support its programs as an "owner"

Options 2 and 3 are the most consistent with the original intent of the City and CFOs for several projects under negotiation – Bella Vista, Rockridge Greenbelt, Lake Merritt Dock or Union Point Park.

It should be noted that "contracting out", which is prohibited by the City's Charter and labor agreements, could be a problem under any of the options if City employees experience job loss or reductions in salary. These restrictions may or may not apply depending on whether the City or CFO controls the project funds. The viability of such claims or grievances would depend partly on the type and nature of the work contracted out and whether the contract price is equivalent to the lost or reduced employee positions. The CFO role should be developed with the contracting out issue in mind.

¹ See Bus. & Prof. Code §§ 7025, et seq., for general requirements, and Bus. & Prof. Code § 7028.15 for public entity, officer and employee requirements. See Civ. Code §§ 3247 & 3248, Code of Civ. Proc. § 995.010, and Walt Rankin & Associates, Inc. v. City of Murietta (2000) 84 Cal.App.4th 605 regarding bond requirements. Additionally, California courts have repeatedly ruled that contracts under which construction work is delivered by an unlicensed party to an owner, for example a "master developer", are in violation of the contractor license law, void and unenforceable – even when all construction work has been performed by licensed subcontractors. See, Vallejo Dev. Co. v. Beck Dev. Co., Inc., et al. (1994) 24 Cal.App.4th 929.