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Via Email: LocalGovPolicy@sco.ca.gov

John Nunan, Chair
California Uniform Construction Cost Accounting Commission
Office of the State Controller
Local Government Programs and Services Division
Local Government Policy Section
P.O. Box 942850
Sacramento, CA 94250

Re: CUCCAC Hearing January 31, 2025; City of Beaumont Park Improvement Project 25-05

This letter is submitted in response to a letter from the California Uniform Construction Cost Accounting Commission ("CUCCAC") dated December 23, 2024. The hearing on this matter was originally scheduled for January 10, 2025, and was continued until January 31, 2025.

The letter states that the Construction Industry Force Account Council ("CIFAC") filed a request to perform an accounting review of the practices used by the City on the Park Improvement Project 24-05. CIFAC alleges a violation of Public Contracts Code Section 22042(c) by allowing work that was *"improperly classified as maintenance*." At the January 10, 2025 hearing issues concerning the use of force account by the City were also raised. However, tforce account issues were not identified by CIFAC in its complaint and it is unclear what the issues are. Prior to making a decision CUCCAC must clearly identify the legal issues it intends to raise against the City.

The City contract for installation of playground equipment at four parks was identified "installation" as the title of the work and the contract was let in accordance with several competitive processes. (**See Attachment "1"**). The title of the contract did mention "maintenance", but the heading of a contract is not dispositive of its meaning so this must be disregarded.

The contract actually covered four separate parks (Sunny Hills, DeForge, Mountain View and Star Carlton). Each park is geographically separate from the others and as such each is a separate public project and a separate facility.

(c) "Public project" means any of the following:
(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, installation, and repair work involving any publicly owned, leased, or operated facility.

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(e) For purposes of this chapter, "facility" means any plant, building, structure, ground facility, utility system, subject to the limitation found in paragraph (3) of subdivision (c), real property, streets and highways, or other public work improvement. (Public Contracts Code Section 22002)

Each of the four different parks must be analyzed separately under the Public Contracts Code since each park is a separate facility and a separate public project. Analyzing the four parks separately is not a form of bid splitting under Public Contracts Code Section 22033, as they are separate and distinct locations. The CUCCAC Board Members publicly stated that the January 10th meeting that work at separate addresses are deemed separate projects.

Total Expenditures by Park				
	Sunny Hills	**DeForge**	**Mountain View**	**Star Carlton**
Contracted Amount	$ 21,744.64	$ 73,554.36	$ 67,462.12	$ 26,642.19
Force Account	$ 5,207.79	$ 10,145.68	$ 5,897.52	$ 2,541.47
Gametime Equipment	$ 41,092.20	$ 121,153.86	$ 184,355.23	$70,934.72

The amount of force account work at each location individually and cumulatively did not exceed the maximum threshold of $75,000 (Public Contracts Code Section 22032). The contracted amount on a per park basis also did not exceed the $75,000 threshold (Public Contracts Code Section 22032). Based on this information the CIFAC complaint is totally without merit and CUCCAC must dismiss this matter against the City of Beaumont.

The competitive processes used by the City complied with the playground equipment manufacturer's warranty requirement that allows only certified installation contractors to install the equipment. Failure to use a certified installer would void the warranty on the playground equipment which would have been contrary to the public interest. The City required the payment of prevailing wages under California Labor Code Section 1770 et. seq. It used a rigorous competitive process involved several layers that was designed to secure the best price for the City while carefully avoiding impropriety, favoritism or corruption.

THE EQUIPMENT COSTS ARE NOT PART OF THE PUBLIC PROJECT

The City separately purchased the playground equipment, and this purchase of playground equipment was not a "Public Project' as conceded by the complaining party, CIFAC. The Uniform Construction Cost Act, Public Contracts Code Section 22002 does not include equipment in the definition of a public project.

(c) "Public project" means any of the following:
(1) Construction, reconstruction, erection, alteration, renovation, improvement, demolition, installation, and repair work involving any publicly owned, leased, or operated facility.

(2) Painting or repainting of any publicly owned, leased, or operated facility.

(3) In the case of a publicly owned electric utility system, "public project" shall include only the construction, erection, improvement, or repair of dams, reservoirs, powerplants, and electrical transmission lines of 230,000 volts and higher.

While the CUCCAC FAQS provide that the cost of owner acquired equipment is to be included in the overall cost of the public project, this FAQ is contrary to the Public Contracts Code, applicable case law and a violation of the Administrative Procedures Act.

Under the Administrative Procedures Act ("APA" Government Code Section 11340 et. seq.) regulations to be enforceable must be adopted through formal rulemaking procedures that further the values of transparency, due process, public participation, and informed decision-making. "One purpose of the APA is to ensure that those person or entities whom a regulation will affect have a voice in its creation... as well as notice of the law's requirements so that they can con form their conduct accordingly...." Tidewater Marine, 14 Cal. 4th at 568-69 (citations omitted) (emphasis added). In enacting the APA, "[t]he Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny." Id. 569.

Accordingly, the APA requires an agency acting in its rulemaking capacity to

- give the public notice of its proposed regulatory action,
- issue a complete text of the proposed regulation with a statement of the reasons for it,
- give interested parties an opportunity to comment on the proposed regulation,
- respond in writing to public comments, and
- forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law, which reviews the regulation for consistency with the law, clarity, and necessity'. Id.; Morning Star, 38 Cal. 4th at 333.

For these same reasons, the APA also forbids the use of "underground" regulations, rules that only the administrative agency knows about. In fact, Government Code Section 11340.5(a) specifically provides as follows:

"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11340.600, unless the guideline . . . or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this Chapter."

CUCCAC has no authority to adopt legislation or to interpret legislation. CUCCAC may not aggregate the playground equipment with the force account amounts or the negotiated contract amounts as it would be a violation of the APA and due process.

EACH OF THE FOUR PUBLIC PARK PROJECTS MET THE NEGOTIATED CONTRACT REQUIREMENTS

As can be seen from the schedule above, the amount of construction cost on each park was less than the $75,000 threshold. Under the California Public Contracts Code projects in the amount of $75,000 or less are subject to negotiated contract. Public Contracts Code Section 22032. The process used by the City was competitive and designed to provide the best service at the lowest price while avoiding favoritism and corruption.

THE CITY USED A COMPETITIVE PROCESS TO BID THE INSTALLATION OF THE PLAYGROUND EQUIPMENT

The GameTime playground equipment must be installed by a certified installer in order for the valuable playground equipment warranty to apply (See **Attachment "2" and Attachment "3" UltraSite Warranty)**. The City obtained four bids for the 4 parks from GameTime certified installers (See **Attachment "4"**). Of the four bids, two were responsive. Jaynes Bros bid $189,403.30 and the other responsive bid was from ORTCO, Inc. in the amount of $218,100. This process was competitive and so the price and terms were favorable to the city and eliminated the likelihood of favoritism or corruption. Use of the trade journal publication method would have been impractical, a waste of time, resources and money and would not have yielded any advantage to the City as only the certified bidders could have bid.

The playground equipment itself was purchased under a competitive contract identified by group purchasing agency Omni Partners which provides pricing based on other state agencies competitively bid contracts. "Using our lead public agency contracting model, we ensure all our cooperative contracts are compliant with public purchasing regulations and are competitively solicited for better efficiency and benefits to your procurement strategy. And, our industry-leading suppliers offer top-notch pricing, giving you confidence in your purchases." (https://www.omniapartners.com/).

THE PROCESS IS SUPPORTED BY THE GRAYDON CASE

Even if it is assumed that formal or informal bidding was required (and it was not required) the process used to enter into the playground installation contract complied with the exception to formal bidding enunciated in *Graydon v. Pasadena Redevelopment Agency*, (1980) 104 Cal. App. 3d 631. The scope of the exception to competitive bidding in this case is primarily based on impracticality or lack of advantage in soliciting competitive bids for certain types of contracts. Specifically, the exception applies when the nature of the contract is such that competitive proposals would be unavailing, would not produce an advantage, or when the advertisement for competitive bids would be undesirable, impractical, or impossible.

The rationale behind this exception is to ensure that the purposes of competitive bidding—such as guarding against favoritism, improvidence, extravagance, fraud, and corruption, and obtaining the best economic result for the public—are still met even when competitive bidding is not feasible.

This exception is construed fairly and reasonably with sole reference to the public interest and in light of the purposes to be accomplished.

CONCLUSION

The City cannot be found in violation of the California Public Contracts Code, including the Uniform Construction Cost Accounting Act, as none of the four park projects exceeded the $75,000 in negotiated contract amount or force account work. The City utilized two separate competitive processes to purchase and install the playground equipment that were intended to eliminate fraud and corruption and obtain the best result for the public. No advantage would have been gained by pursuing the intermediate or formal public bidding processes and they did not apply in any event.

Very truly yours,
SBEMP LLP

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