

CITY OF SACRAMENTO



DEPARTMENT OF LAW
812 TENTH STREET SACRAMENTO, CA 95814
SUITE 201 TELEPHONE (916) 449-5346

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City Attorney
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Assistant City Attorney
LELIAND J. SAVAGE
SAMUEL L. JACKSON
WILLIAM P. CARNAZZO
DIANE B. BALTER
CHRISTINA PRIM
Deputy City Attorneys

March 24, 1983

Hon. City Council
City Hall
Sacramento, CA 95814

Re: DEPARTMENT OF BUILDERS MUTUAL SURETY COMPANY
APPROVED
BY THE CITY COUNCIL

Members in Session:

MAR 29 1983

Summary

OFFICE OF THE
CITY CLERK

On February 23, 1983, the City Council referred the question of disqualification of Builders Mutual Surety Company to the City Manager and City Attorney for consideration and recommendation. The City Manager and City Attorney recommend that Builders Mutual be disqualified until January 1, 1984, from submitting bonds for contractors doing City work. In addition, before the City accepts additional bonds, Builders Mutual should be required to reimburse the City for its \$315 in costs incurred in the prior litigation with Builders Mutual.

Background

On February 23, 1983, the City Council considered the recommendation of Deputy City Attorney Lee Savage that no bond issued by Builders Mutual Surety Company be accepted by the City in the future. A copy of Mr. Savage's recommendation is attached. This recommendation was based upon the prior refusal of Builders Mutual to pay the City on a bid bond submitted by the company in 1982. After discussion, the Council referred this matter to the City Manager and City Attorney for recommendation.

I have discussed this issue with Glendora Taylor, Executive Director of the Greater Sacramento Area Plan. It is Ms. Taylor's opinion that the disqualification proposed herein is reasonable. I have also talked to Melvin Murphy, who appeared before the City Council on February 23. He indicated that a disqualification until January 1, 1984, would be reasonable, in his opinion, under the circumstances. Builders Mutual had previously agreed to pay the City's costs in this matter.

Hon. City Council
March 24, 1983
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I have also talked to a bond broker who indicates that there are seven to ten bonding companies which make an extra effort to provide bonds for small minority contractors. I was concerned about this because it was claimed that if we disqualify Builders Mutual, small minority contractors would be unable to obtain bonds. My investigation indicates this would not be the case.

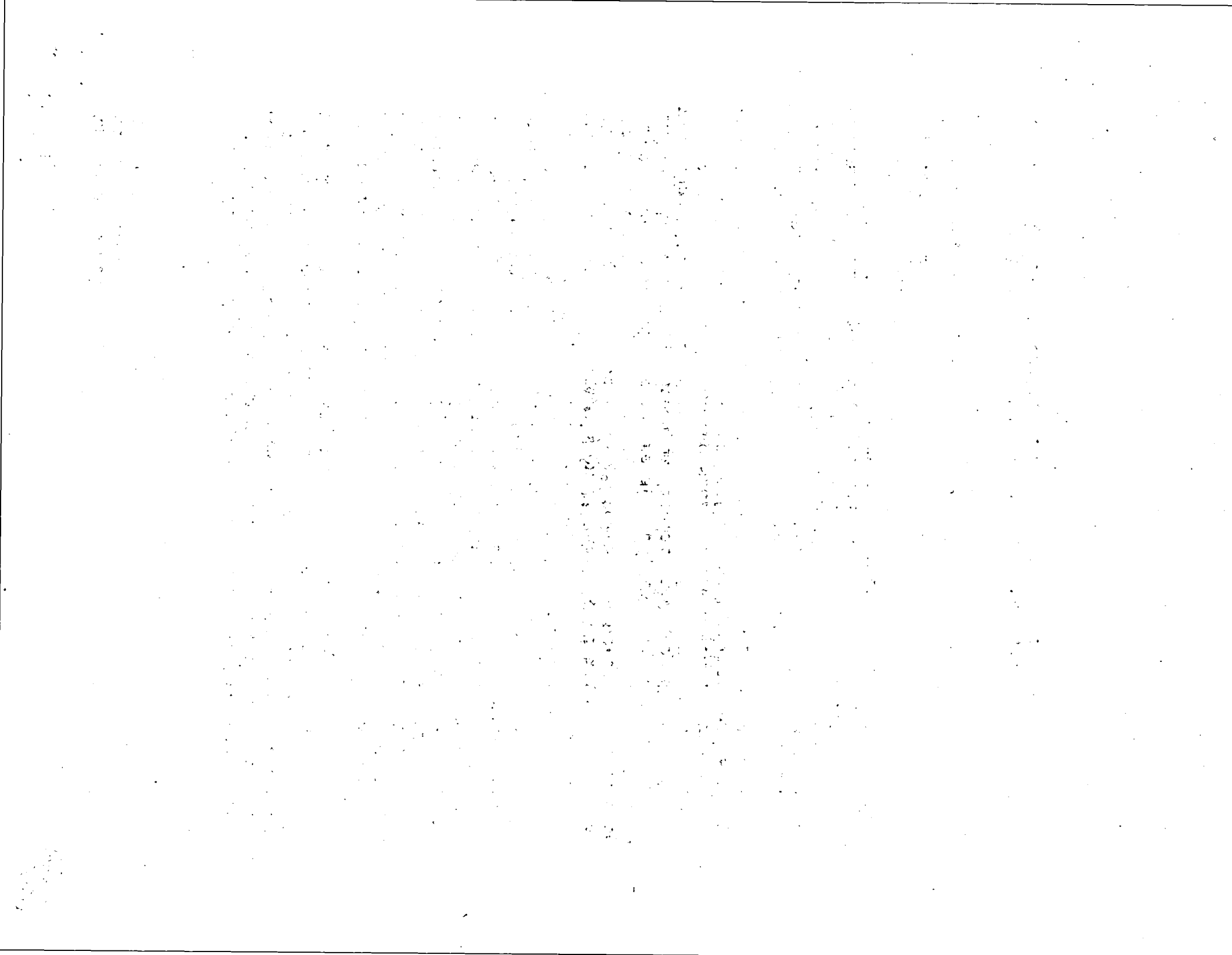
Mr. Rubin, representing Builders Mutual, also raised a question as to the City's authority to disqualify a surety company. He based this opinion upon Government Code Sections 37931 and 4420. Government Code Section 37931 has been recodified as Public Contract Code Section 20170; a copy of this section is attached. Mr. Rubin's argument is that the City must accept a bidder's bond executed by any "admitted surety insurer" in California. We disagree. There is a serious question as to whether this section even applies to a charter city. This section is applicable only to cities which are subject to Title 4 (commencing with Section 34000 of the Government Code). (See Public Contract Code Section 20160.) Title 4 of the Government Code applies to general-law cities, not charter cities. Even if Public Contract Code Section 20170 did apply to a charter city, there is nothing in the section which prevents a city from determining that a particular admitted surety insurer in California, because of its past actions in dealing with the city, should be disqualified from doing business with that city for a specified period of time. I have discussed this issue with a member of the staff of the State Insurance Commissioner, and they could see nothing wrong with a decision by the City to disqualify the surety for a limited period of time.

Government Code Section 4420 (copy attached) merely prevents a public agency from requiring that a contractor do business with a "particular surety or insurance company." If the City Council disqualifies Builders Mutual, it will not require contractors to do business with a particular company since we would be disqualifying only one of the many surety companies in the state.

Recommendation

It is the recommendation of the City Manager and the City Attorney that:

1. Builders Mutual Surety Company immediately pay the City its costs in the litigation which amounted to \$315; and



Hon. City Council
March 24, 1983
Page three

2. Bonds issued by Builders Mutual Surety Company would be acceptable on City projects only after January 1, 1984.

Very truly yours,

James P. Jackson
JAMES P. JACKSON
City Attorney

JPJ/p

Attachments

Recommendation approved:

Walter J. Slize

City Manager

March 29, 1983
All Districts

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CITY OF SACRAMENTO



DEPARTMENT OF LAW
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CITY MANAGER'S OFFICE
RECEIVED
FEB 23 1983

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DIANE B. BALTER
CHRISTINA PRIM
Deputy City Attorneys

February 23, 1983

Honorable City Council
City of Sacramento
City Hall
Sacramento, California

In re: Debarment of Builders Mutual Surety Company

Members in Session:

SUMMARY

The conduct of Builders Mutual Surety Company with respect to its dishonor of a bid bond during 1982 was so irregular that the City Attorney recommends that the City of Sacramento accept no further bonds issued by Builders Mutual Surety Company.

BACKGROUND

The standard specifications of the City of Sacramento require that bids for public works be accompanied by a bid bond issued by a corporate surety or other security to guarantee that the low bidder will subsequently execute contracts and furnish performance and payment bonds. On April 20, 1982 Tatum and Sons submitted a bid to City of Sacramento for various water main installations in the sum of \$80,799.77. The bid was accompanied by a bid bond executed by Builders Mutual Surety Company. On May 11, 1982 the City Council awarded the contract to Tatum and Sons. Within the time allowed by the bid documents to execute the contract documents and to submit the required performance and payment bonds, Tatum and Sons failed to execute and furnish the necessary documents. On June 22, 1982 the City Council annulled the award of the contract to Tatum and Sons and awarded the contract to the second low bidder, Mexica Construction Co., Inc., for the sum of \$85,069.00. Mexica Construction Co., Inc. furnished the required performance and payment bonds and executed the contract documents.

By the terms of its bid bond, Builders Mutual Surety Company became liable to the City of Sacramento for payment of the difference between the amount of the bid of Tatum and Sons and the larger amount for which the City contracted with Mexica Construction Co., Inc. to perform the work. That was the sum of \$4,269.23. The City demanded payment on the bid bond on June 30, 1982.

Honorable City Council
February 23, 1983
Page Two

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Builders Mutual Surety Company refused to pay the sum required by its bid bond. The City brought an action on which judgment was entered on February 14, 1983 against Builders Mutual Surety Company in the amount of \$4,268.23.

Builders Mutual Surety Company filed an answer to the aforementioned action which was nothing more than a general denial based on lack of information and belief. The answer was verified by the Treasurer of the company who also coincidentally was the attorney who filed the answer. The answer raised no affirmative defenses.

It is common and not unusual for a surety company to raise defenses to its liability with respect to failure for contractors to perform. There have been lawsuits with respect to such defenses and will be in the future. Where these defenses are asserted in good faith, I feel, that there is no objectional conduct on the part of the surety. In this case, I am of the opinion that the refusal of the surety to pay on the bid bond was not justified on any grounds whatsoever, and an answer was filed in the lawsuit merely for the purpose of delay. In my opinion, I have never seen such conduct from a surety company.


FINANCIAL DATA

The only conceivable financial impact on the City by taking the recommendation of the City Attorney is to prevent lawsuits in the future by virtue of the failure of this surety company to honor its bonds.

RECOMMENDATION

That the Council authorize and direct the City Attorney to give notice to all local building associations that no bond issued by Builders Mutual Surety Company will be acceptable to the City in the future.

Respectfully submitted,


LELIAND J. SAVAGE
Deputy City Attorney

LJS:kn

FOR CITY COUNCIL INFORMATION


WALTER J. SLIPE, City Manager

Cc's: Ron Sanes, President
Dale F. Rubin, Esq.
John Varozza

March 1, 1983
All Districts

§ 20170. Presentation of bids; accompanying security

All bids shall be presented under sealed cover and accompanied by one of the following forms of bidder's security:

- (a) Cash.
- (b) Cashier's check made payable to the city.
- (c) A certified check made payable to the city.
- (d) A bidder's bond executed by an admitted surety insurer, made payable to the city.

CHAPTER 6. UNFAIR AND COERCIVE INSURANCE REQUIREMENTS

§ 4420. Bids on public buildings or construction contracts; applicability of chapter; public agency, defined

No officer or employee of this state, or of any public agency or of any public authority, and no person acting or purporting to act on behalf of such officer, employee, or public agency or authority, except a public agency or authority created pursuant to agreement or compact with another state, shall, with respect to any public building or construction contract which is about to be or which has been competitively bid, require the bidder to make application to, or furnish financial data to, or to obtain or procure any surety bond or contract of insurance specified in connection with such contract, or specified by any law, ordinance, or regulation, from a particular surety or insurance company, agent or broker. No such officer or employee, or person, firm, or corporation acting or purporting to act on behalf of such officer or employee, shall negotiate, make application for, obtain, or procure any such surety bond or contract of insurance (except contracts of insurance for builder's risk or owner's protective liability) which can be obtained or procured by the bidder, contractor, or subcontractor.

This chapter shall not apply to any project under design or construction on August 4, 1967, by or on behalf of a public agency or authority if such agency or authority was then engaged in insurance activity with respect to such project that otherwise would be prohibited by this chapter.

This chapter shall not apply to the construction of any exclusive public mass transit guideway project in any county with a population exceeding 6,000,000.

As used in this section, "public agency" means any city, county, city and county, district, municipal or public corporation or any agency or instrumentality thereof. (Amended by Stats.1981, c. 481, p. —, § 1.)



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812 TENTH STREET SACRAMENTO, CA 95814
SUITE 201 TELEPHONE (916) 449-5346

March 11, 1983

Honorable City Council
City of Sacramento
Sacramento, California

In re: Debarment of Builders Mutual Surety Company

Members in Session:

I regret that I must ask for another one week continuance on this matter. I have talked to several people on this subject already, but I have been unable to reach two people I want to talk to before making my recommendation to the Council. One of these persons is on vacation this week. I also want to talk to the City Manager in more detail and he is on vacation this week.

Therefore, I ask that this item be continued until March 22, 1983.

Very truly yours,

JAMES P. JACKSON
City Attorney

JPJ:kn

FILED
By the City Council
Office of the City Clerk

Cont 40
3-22-83

MAR 15 1983

FILED
By the City Council
Office of the City Clerk

Cont 40
3-22-83

MAR 22 1983



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CITY OF SACRAMENTO



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CITY MANAGER'S OFFICE
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FEB 23 1983

February 23 1983
FILED By the City Council
By the City Council Office of the City Clerk
Office of the City Clerk
Cont 40 *3-15-83*
3-8-83 MAR 8 1983
MAR 1 1983

Honorable City Council
City of Sacramento
City Hall
Sacramento, California

In re: Debarment of Builders Mutual Surety Company

Members in Session:

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RECOMMENDATION

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Respectfully submitted,

Leland J. Savage
LELIAND J. SAVAGE
Deputy City Attorney

LJS:kn

FOR CITY COUNCIL INFORMATION

Walter J. Slipe
WALTER J. SLIPE, City Manager

Cc's: Ron Saney, President
Dale F. Rubin, Esq.
John Varozza

March 17, 1983
All Districts

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10/10/10