MEMORANDUM OF LAW

DATE: June 6, 1990

TO: Milon Mills, Jr., Director, Water Utilities,
via Jack McGrory, Assistant City Manager

FROM: City Attorney

SUBJECT: Rejection of Water and Sewer Main Construction
Based Upon Television Inspection

This memorandum pertains to the City's rejection of construction work performed on water and sewer main construction projects by the following contractors: R.E. Hazard Contracting Co., El Cajon Grading and Engineering Co., Cameron Brothers Construction Co., Cal Southwest Construction Co., the Buie Corporation and T.C. Construction Co.

On February 26, 1990, a staff meeting was convened by Assistant City Manager Jack McGrory. The purpose of this meeting was to address concerns which had been raised by the Construction Industry Federation (CIF) to prepare the Manager's office for a meeting with CIF's Jim Casey later the same day. Briefly stated, these concerns arose from the City's rejection of several "completed" water and sewer main construction projects, the rejection of which had been based upon a previously uncontemplated method of inspection.

Unsatisfied with the results of his meeting with the Manager's office, Mr. Casey sent a letter to me that outlined concerns which CIF believes are still unresolved. A copy of this letter is attached for your reference. The issues have not changed since your last meeting with CIF on January 29, 1990. CIF's concerns can be summarized as follows:

1. TV inspection represented a new "Standard of Practice" which had not been included in the specifications of the rejected projects. Because there was no prior notice to bidders, rejection was, therefore, "after the fact."
2. The amount of sag deflection constituting grounds for rejection had never been previously specified. Only recently had the City adopted a one-half inch tolerance criteria.
3. The City's historical standard of practice had been based upon visual inspection only. Sags occurring on flat gradients were not detected and were routinely accepted.
4. Removal and reconstruction of pavement and pipe sections is costly, not warranted, and will significantly impact

busy streets and built-up communities.

CIF's recommendation is, "╒tσhat 'Amnesty' be granted to those rejected projects in which previously given approvals were reversed by this change in standard of practice in inspection. Rejection should instead be limited to only those pipe sections with major sag deflections which would clearly pose operational or maintenance problems."

Ultimate acceptance or rejection of this recommendation is predominantly a policy issue, within the province of the City Manager's office and the Water Utilities Department. However, CIF does present a legal issue appropriately addressed by this office. Specifically, can a construction project, a portion of which had been previously inspected by a field inspector and approved, be rejected after a subsequent inspection using an inspection method not contemplated in the contract specifications?

The short answer is: under appropriate circumstances, yes. Incidental to this issue are the following issues: First, is approval of pipe alignment and grade by a field inspector tantamount to acceptance of the entire project? Second, does the City have to identify in the terms of the contract, the method of inspecting to insure performance to specification? Third, does section 6-11 of the 1986 Regional Supplement Amendments to the 1985 Standard Specifications for Public Works Construction ("Green Book") cover patent or latent defects.

In a statement prepared by CIF in November, 1989, they assert what appears to be an estoppel argument regarding sags subsequently identified in the pipelines. The essence of this argument is that once a field inspector inspects pipe in an open trench and finds no patent defect in grade alignment, coupling, bedding, etc., and the contractor in reliance on that approval backfills and paves over the filled trench, the City should be estopped from rejecting the project upon subsequent discovery of defective workmanship or materials. By this assertion, it would appear that CIF equates a positive field inspection of pipe in an open trench with acceptance of the entire project and waiver of any subsequently discovered latent defects. This is clearly erroneous.

Section 6-8 of the Green Book addresses completion and acceptance of work, and states:

> The Work will be inspected by the Engineer for acceptance upon receipt of the Contractor's written assertion that the Work has been completed.

> If, in the Engineer's judgment, the Work has been completed and is ready for acceptance, it will so certify to the ╒City Managerσ, which may accept the completed Work. The Engineer will, in its certification to the ╒City Managerσ, give the date when the Work was completed. This will be the date when the Contractor is relieved from responsibility to protect the Work.

Acceptance of the "Work" is a formal process which includes the City Engineer's certification to the City Manager that all work has been properly completed and the recording of a Notice of Completion with the County Recorder. A positive inspection of a pipe in an open trench may contribute to the Engineer's Certification and ultimate recommendation that the City Manager accept the work, but the inspection itself does not constitute acceptance. Acceptance is the final act which triggers full performance (payment to the contractor) by the City. It cannot occur until completion of the entire construction project. Workmanship not meeting contract specifications could occur in any number of ways between the time when the constructed pipeline is inspected and the time when the backfilled trench is paved. The contractor should not be permitted to assert an estoppel defense based upon the pro tanto approval of the pipeline as it lays in an open trench.

CIF dwells on the fact that at the time each of the contracts in question was awarded, inspecting the inside of pipelines with a television camera was not specified in the contracts and constituted a major departure from the normal "Standard of Practice." This argument, as a basis for compelling the City to accept defective work, lacks merit. The contractor's obligation under the contract was to construct pipelines to specification.

In the absence of an agreement to use a specific method to inspect for performance to contract specifications, the City is free to use any method. Only a factual determination as to the accuracy of the method need be established. This point is strongly implied in San Bernardino Valley Water Development Co. v. San Bernardino Valley Municipal Water District, 236 Cal. App. 2d 238 (1965), wherein controversy arose regarding the method of inspecting for compliance with a contract term to produce water from other than a specified watershed. There, the court stated, "If the parties agreed upon a method of inspection, and the person to do the inspecting, that agreement was binding upon the parties . . . ." Id. at 260. Under the terms of the contracts

presently contested, the City did not so limit itself regarding inspection methods. In the absence of such limitation, the City could use video cameras, or any other accurate method, to inspect pipelines for sags.

It is difficult to reasonably argue that pipeline sags discovered by video inspection should be treated as though non-existent, merely because they were discovered by use of a new technique. Nevertheless, the timing of the discovery, regardless of the method used, may have significant impact upon the rights and liabilities of the parties.

Grade and alignment defects in underground pipeline construction are addressed in section 306-1.2.2 of the Green Book. This section provides, in pertinent part:

> Pipe will be inspected in the field before and after laying. If any cause for rejection is discovered in a pipe after it has been laid, it shall be subject to rejection . . . . Pipe shall be laid to Plan line and grade, with uniform bearing under the full length of the barrel of the pipe. Suitable excavation shall be made to receive the socket or collar, which shall not bear upon the subgrade or bedding. Any pipe which is not in true alignment or shows any undue settlement after laying shall be taken up and relaid at the Contractor's expense (emphasis added).

What constitutes "undue settlement" of a pipeline is a factual issue which can only be resolved by examining the intent of the parties and the impact of settlement upon maintenance and operation of the pipeline. However, if undue settlement was the cause of the pipeline sags, and they could have been discovered by reasonable attention to the duties of inspection pursuant to section 306-1.2.2, but were not so discovered until after acceptance, these sags would not constitute latent defects.

Additionally, where there is nothing to indicate any effort by the contractor or his employees to hamper or restrict inspection of the City's inspector, the contractor cannot be held responsible for negligence or mistake on the part of the City's inspector in the matter of such inspection. City Street Improvement Co. v. Marysville, 155 Cal. 419, 431-32 (1909).

Section 6-11 of the Regional Supplement Amendments to the Green Book (a provision in each of the contested contracts) states:

> All work shall be guaranteed by the Contractor

> for a period of one (1) year from the date of acceptance of the work, against defective workmanship and materials furnished by the Contractor. The Contractor shall promptly replace or repair in a manner satisfactory to the Engineer, any such defective work, after notice to do so from the Engineer, and upon the Contractor's failure to make such replacement or repairs promptly, the Agency may perform this work and the Contractor and his sureties shall be liable for the cost thereof.

On its face, this provision appears to guarantee against both patent and latent defects. However, it must be considered in pari materia with other sections of the Green Book (i.e. 302-5.1, 306-1.2.2 and 306-1.4.7), which provide for inspection and approval upon the completion of progressive phases of underground pipeline construction, from bedding to permanent trench resurfacing. These sections provide that if defects are discovered during inspection at any of the specified phases prior to permanent resurfacing, the work will be rejected and the rejected work redone. These inspection provisions strongly support an argument that the guarantee in section 6-11 covers only latent defects, or defects occurring during the last phase of construction. See Hagginwood Sanitary District v. Downer Corp., 179 Cal. App. 2d 756 (1960).

In Hagginwood, the court found that the guarantee provision of an underground pipeline construction contract covered both latent and patent defects. However, the language of the guarantee differed significantly from Section 6-11 of the Regional Supplement Amendments to the Green Book. In Hagginwood the guarantee provided:

> All work shall be done and completed in a thoroughly workmanlike manner . . . .
>
> All defective work or materials shall be removed from the premises by the Contractor . . . and shall be replaced or renewed in such manner as the Engineer may direct. All material and workmanship of whatever description shall be subjected to the inspection of, and rejection by, the Engineer if not in conformance with the specifications.
>
> Any defective material or workmanship, or any unsatisfactory or imperfect work which may

> be discovered before the final acceptance of the work or within one (1) year thereafter, shall be corrected immediately on the requirement of the Engineer . . . notwithstanding that it may have been overlooked in previous inspections . . . . Failure to inspect work shall not relieve the Contractor from any obligation to perform sound reliable work as herein described. ((Emphasis added.)

Id. at 758.

At best, Section 6-11 is ambiguous as to its coverage. This ambiguity could be eliminated by adopting language similar to that in the Hagginwood guarantee provision.

To summarize thus far, the City's use of video cameras to detect defective workmanship has no effect upon the contractors' obligation to construct pipelines without sags, even if use of the cameras was not identified in the contract. If patent defects are discovered during any of the inspections called for in the contract provisions, the contractor is obligated to repair or replace the defective workmanship or materials, before proceeding with the next phase of construction. Final acceptance of the project may be withheld until all discovered defects have been cured. If the sags could not have reasonably been discovered during a diligent inspection of the pipeline in the open trench, but were subsequently discovered (after permanent resurfacing) by video inspection, these sags would constitute latent defects, and be covered by the guarantee, as long as they were discovered during the one year guarantee period. The same would be true if the sags in the pipeline occurred during the backfilling, compaction or resurfacing processes.

Clearly, the most favorable factual scenario is one wherein a video inspection of a pipeline was conducted sometime prior to permanent resurfacing. Sags detected therein would constitute a basis for rejecting the work and compelling replacement or repair at the contractor's expense. Another highly favorable scenario would be where all diligent inspections prior to permanent resurfacing reveal no defects, but inspection after resurfacing reveals sags. These sags would provide a basis for refusing to accept the project until the sags were repaired, at contractor's expense.

The least favorable scenario would be one wherein a video inspection of a pipeline was conducted after the project had been accepted and after the guarantee period had expired. The

contractor would no longer have any legal obligation to repair sags or other defects discovered in this untimely inspection.

Somewhere between most favorable and least favorable is a scenario wherein sags could have been detected during a diligent inspection at some point prior to acceptance of the project, but were not. Subsequent to acceptance, but during the guarantee period, video inspection reveals these sags. Determining the rights and responsibilities of the parties under this scenario is contingent upon resolving whether the guarantee covers all defects, latent or patent. As discussed earlier, it is our belief that the guarantee covers only latent defects. Therefore, under this scenario, the City's formal acceptance of the project terminates the contractor's liability for the subsequently discovered sags.

Based upon the information provided by Charles Yackly in his memorandum dated May 29, 1990 (attached for reference), sags in pipelines constructed by Cameron Brothers (Sewer Replacement Group 59A) and Buie Corp. (La Jolla Ridgegate) were discovered under the most favorable scenario. Notices of Completion have not yet been filed in either case. Sags in pipelines constructed by El Cajon Grading and Engineering (Sewer Main Replacement Group 460) were discovered under the least favorable scenario; acceptance occurred on August 10, 1988, the guarantee period expired on August 10, 1989, and the inspection revealing the sags was performed in December 1989.

Sags in pipelines constructed by R.E. Hazard (Brittania Subdivision) and Cal Southwest (Sewer Replacement Group 82) were discovered after acceptance but prior to expiration of the guarantee. In these cases, it is a question of fact whether or not the sags could reasonably have been detected during inspections prior to permanent resurfacing or prior to acceptance. Under these circumstances, it is imperative for each field inspection to have been conducted with the utmost care and diligence and for acceptance to not have occurred until all known defects were cured.

A noteworthy case which underscores this point is City Street Improvement Co. v. Marysville, 155 Cal. 419 (1909). In this case, the City of Marysville refused to make final payment to a contractor who had constructed the underground pipelines for the city's sewer system. After formal acceptance of the project, defects in workmanship caused leakage into the pipes. The magnitude of the leakage consumed three fourths of the carrying capacity of the pipeline. Id. at 424.

Notwithstanding the obviously significant impairment of the

pipeline's operation, the California Supreme Court stated:

> ┌Iσt was entirely competent for the city, through its engineer and his subordinates, to determine that the sewer as laid in the open trench and ready to be covered with earth was just what the contract required. Having seen it and having had the fullest opportunity of inspecting it, all of those defects which were visible, or could have been ascertained by a reasonable inspection, were waived.

Id. at 431.

In conclusion, CIF's recommendation that rejection be limited to "those pipe sections with major sag deflections which would clearly pose operational or maintenance problems," is considerably more charitable than legally required as to the work performed by El Cajon Grading and Engineering. Similarly, if the sags could have been discovered prior to acceptance of the R.E. Hazard and Cal Southwest jobs, CIF's recommendation has merit, not because of the method used to inspect the pipe, but because of the timing of the inspections. CIF's recommendation has no applicability to the remaining jobs because discovery of the sags was timely and the jobs were never accepted.

JOHN W. WITT, City Attorney
By
Richard L. Pinckard
Deputy City Attorney

RLP:jrl:112.2(x043.2)
Attachments
cc Roger Frauenfelder
Deputy City Manager
ML-90-68