

CITIZENS LEAGUE REPORT

No. 69

**Ammendment to Minneapolis City
purchasing ordinance**

February 1957

Citizens League
601 Syndicate Building
Minneapolis 2, Minnesota

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APPROVED BY BOARD OF DIRECTORS, FEBRUARY 15, 1957

January 28, 1957

To: Members of the City and Metropolitan Government and Operations
Committee, Citizens League of Minneapolis and Hennepin County

From: D. B. Magraw, Chairman of City and Metropolitan Government and
Operations Committee

Subject: Proposed Amendment to the City Purchasing Ordinance

A copy of the proposed amendment to the City Purchasing Ordinance was enclosed with the notice of Thursday's meeting which you received last week. I would appreciate your reading the proposed amendment and the enclosed report prior to the meeting so that we can be prepared to discuss and act upon it. On December 13, 1956, I submitted a preliminary report on this matter to the Citizens League Board. On the basis of that report, the Board asked the Council Ordinances and Legislation Committee at a public hearing on December 18, to postpone hearings. A hearing was begun on December 18 but was continued to February 18.

Applicability. This amendment would apply to "any department under the jurisdiction and supervision of the City Council." It would presumably not apply to the Board of Education, Library Board, Park Board, or Board of Welfare.

Purpose. The purpose of the proposed amendment is to give the city a contract "escape clause" in case of labor problems. It is an outgrowth of a situation which existed last summer involving the installation of street lighting posts in the city. The amendment is an attempt to protect the public interest by insuring that the situation that then occurred could not happen again.

Language of the Amendment. The language in the amendment is broad. There are several phrases which I believe should be particularly noticed:

1. The amendment uses the term "any labor troubles or disputes". As I understand it, the phrase "labor troubles" is not defined in the statutes although the term "labor disputes" is quite frequently defined.
2. Labor troubles or disputes may be "actual or threatened". The implications of the word "threatened" are obvious.
3. The amendment specifies that the labor problems arising need not be "within the power of any party to the bid or contract to concede."
4. The amendment would permit contract termination by the city when a labor problem "shall impede, hinder, delay or prevent" completion of the contract or use of the goods purchased under the contract. The words "impede", "hinder", and "delay" are highly subjective.

In defense of this language, Mr. D.J. Shama of the City Attorney's office stated that such phrases are commonplace to contracts which the city signs with successful bidders.

Apparent Effect. There appear to be certain adverse effects which would result if this amendment were adopted.

1. The presence of a requirement in "every call or advertisement for bids and every contract executed by the city" as called for by the amendment would inevitably result in higher purchasing costs. The Minneapolis purchasing ordinance and procedures now permit competitive bidding.

This amendment is probably without precedent in any governmental jurisdiction in the United States. Presumably it is also without precedent in private industry. Its enactment would put Minneapolis in a unique purchasing position which could not fail to increase costs. It appears certain that this amendment, if passed, would prevent many bidders from bidding on city business. Those bidders who continue to bid would be forced to increase their bids to cover the possibility of contract termination. Even if a bidder is sure of his own labor relations, he would have to include a safety valve in his bid because of the possibility of labor troubles elsewhere that might in some way affect the contract.

2. The effect of this amendment is to repeal the lowest responsible bidder provision now existing and replace it with a provision sounding like this: "The lowest responsible bidder who has no labor troubles of his own and who is fortunate enough to put in a low bid and complete the contract during a time when neither the city itself or any one in any way concerned with the contract is having labor troubles".
3. This proposal would put the City Council in the middle of a potentially explosive situation. Regardless of the political persuasion of the councilmen, questions of judgment would have to be applied in interpreting the proposed amendment. The city would have the option to terminate. Unless this option were exercised universally, it would mean that the Council would sooner or later be in the position of deciding the relative merits and importance of labor troubles or disputes.
4. The proposal could serve as a device for vendors to exclude their competitors from bidding for city business.
5. Other questions important to the League and to the City Council are that such an Ordinance would tend to discourage new business in Minneapolis and to encourage retaliatory legislation in other communities.

Legal Considerations. There is serious question as to whether the elements of a contract could be met under the provision of the proposed amendment. It may be that this would lead to "illusory" rather than a firm contract. Mr. Shama said that there are few court decisions relevant to this and thus no sure way to indicate how the courts would decide.

It is my understanding that escape clauses running either to the buyer or the seller (usually to the seller) excuse a party from performance for a period equal to the period of an "act of God" or other unusual and uncontrollable circumstances. If the proposed amendment were passed we would not have a temporary "escape clause", but we would have established a permanent escape clause for non-performance and, in the case of the light pole incident, non-performance that was at least in part within the buyer's control.

Miscellaneous. The public interest is certainly involved in this matter. The question is whether this amendment would result in a service or disservice to the community. Government is not alone in being concerned with the public interest. Public utilities as a class are so concerned, as are privately-owned hospitals and transportation systems, and a wide variety of other private industry.

It is inevitable in all human endeavor that there be conflict, friction, change, and delay. A part of the administrative task is to cope with these problems. Neither government nor its citizens can duck these problems unless prepared to pay for the privilege. Even in the time of fundamental crisis such as World War II, contract termination was accompanied by equitable settlements to all concerned. There was no such thing as an outright termination "in the public interest" with the manufacturer holding the bag. In a very real sense, this amendment would introduce a new concept in contract relationships - "let the seller beware" - and Minneapolis citizens would pay accordingly.

Recommendations. In view of the foregoing, I recommend that this committee approve the following for action by the Citizens League Board.

The City and Metropolitan Government Operations Committee believes that the proposed amendment to the purchasing ordinance to include a labor dispute escape clause ~~in the purchasing ordinance~~, would substantially increase purchasing costs; would put the City Council in the difficult position of deciding the relative merits and importance of labor troubles on disputes; while it is intended to protect the public, uses a clumsy approach which would do more harm than good; and would eventually damage local industry and the tax base. We therefore urge the Citizens League Board to advise the City Council Ordinance and Legislation Committee of its opposition to the proposal.

Approved by Board of Directors
February 15, 1957