



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: April 10, 2012 REPORT NO. 12-041

ATTENTION: Rules, Open Government and Intergovernmental Relations Committee Meeting of April 18, 2012

SUBJECT: Small Local Business Enterprise (SLBE) Programmatic Review and Potential Enhancements

REFERENCE: Small Local Business Enterprise Program Implementation Document

REQUESTED ACTION:

None. Informational Update.

BACKGROUND:

In January 2010, the Mayor and City Council approved a Small Local Business Enterprise Program. The Program was designed in part to provide a race-and gender-neutral tool for the City to use in its efforts to ensure that all segments of its local business community have a reasonable and significant opportunity to participate in City contracts. It applies to construction, A&E consultant and goods/services contracts.

The Program was implemented July, 2010 and included a commitment to regularly evaluate the progress of the Program using accumulated availability and utilization data to determine specific program provisions that require modification, expansion, and/or curtailment. This report has been prepared to follow through with our commitment.

SUMMARY

Staff has identified several potential programmatic improvements to further research and obtain stakeholder feedback on that may enhance contract opportunities, address barriers and further the City's commitment to small local businesses.

In its first full year of implementation, the participation levels of certified firms significantly increased in construction. During FY2011, City certified Small and/or Emerging Local Business Enterprises (SLBE/ELBE) were awarded 12.9% (\$18.6 million) of the total construction dollars. Taking into account all other City recognized certifications (i.e. Disadvantaged,

Minority, Woman, Disabled Veteran, etc.), the percentage increases to 16.4% (\$23.5 million). Prior to the implementation of this program, City recognized certified firms were awarded 4.4% in FY2010 and 3% in FY2009.

A&E Consultant contract awards experienced a decline in FY2011 and fell short of the 20% SLBE/ELBE goal. City certified SLBE/ELBE firms were awarded 3.1% (\$1.83 million) with awards to all City recognized certifications (includes Disadvantage, Minority, Woman and Disabled Veteran owned firms) totaling \$9 million or 15.4%.

Restricted Competition - Construction

The increase in dollars awarded is due, in part, to the “Minor Public Works” component of the Program which provides restricted competition to SLBE/ELBE firms on construction projects valued at \$500,000 and below. SLBE/ELBE firms competitively bid for City prime contracts. The chart below provides numeric details of the FY2011 restricted competition projects:

Total No. of Contracts Awarded	No. of Restricted Contracts Awarded*	Total Dollars Awarded	Total Dollars Awarded to SLBE/ELBEs	Dollar Value of Restricted Contract Awards*	Percent of Dollars Awarded to SLBE/ELBEs
112 100%	34 30%	\$143,884,496 100%	\$18,664,900 12.9%	\$7,064,325 4.9%	37.9%

*Correction to numbers reported in Report #11-126

Of the \$18.6 million awarded to SLBE/ELBE firms, over \$7 million (37.9%) were direct City contracts through restricted competition. In addition, all bids were lower than the engineer’s estimate. These SLBE/ELBE prime contract opportunities assist the City with achieving the objective of: providing additional avenues for the development of new capacity and sources of competition for City contracts from a growing pool of small and locally based businesses as outlined in the Program.

Potential Improvement: Raise the limit of restricted competition projects. Please see the attached City Attorney Opinion which identifies legal issues requiring further analysis.

Restricted Competition – A&E Consultants

A restricted competition program for A&E consultants was implemented in August 2011 for which the design/engineering services were estimated to cost \$25,000 and below. Departments hiring an A&E Consultant for professional services must contact, solicit a proposal from and consider for award, a minimum of one (1) firm from the City’s approved SLBE list. This requirement is waived if there are no qualified firms on the list. It is the Project Manager’s responsibility to select a firm from the SLBE/ELBE list or to obtain a written waiver from EOCP. Results of this effort will be provided in our annual report. A key to the success of this program is to ensure an appropriate number of projects are available at this dollar amount. We will continue to monitor progress in this area.

Potential Improvement: Public Works Engineering & Capital Projects to focus on creating additional small contract opportunities for consultants similar to efforts with construction contracts.

Good Faith Effort Documentation

Major Public Works projects (\$1M and above) include on a contract-by-contract basis, mandatory subcontractor participation requirements for SLBEs and ELBEs. Prime bidders must achieve the mandatory subcontractor participation requirement or demonstrate a "good faith effort". "Good faith effort" is an implied contractual term and it is defined as "what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances." Troutt v. City of Lawrence, 2008 U.S. Dist. LEXIS 61641 (S.D. Ind. Aug. 8, 2008). The City's guidelines for demonstrating good faith were initially based on the federal government's good faith effort requirements in an effort to provide consistency. These guidelines were subsequently modified under the guidance of the City Attorney's Office to address industry concerns regarding subjectivity.

Since that time, the industry raised additional concerns and staff convened a cross sectional focus group to review the requirements and obtain feedback. Staff recorded the feedback, analyzed the intent of good faith efforts and developed refinements. These refinements have been reviewed by the City Attorney's Office and will be presented at various stakeholder meetings for final recommendations.

Potential Improvement: Refine requirements of good faith effort requirements for low bid construction projects.

Goals

The Goal Setting Committee is a subcommittee of the Capital Improvement Program Review and Advisory Committee (CIPRAC) of which the Director of Administration is a member. This group establishes an annual CIP SLBE/ELBE goal based on the overall availability of firms and the types of projects anticipated. The first year of the Program, a 5% goal was established based on a very low availability base. For FY2012, the goal is 15% which was determined based on the increased number of certified firms, and the types and delivery methods of anticipated projects. In addition, Public Works staff establishes contract by contract goals utilizing the Caltrans goal development methodology. The methodology used is:

- A. NAICS codes of work categories included in project and percentage
- B. Total number of businesses in the market area (San Diego County) by NAICS codes
- C. Total number of certified SLBE/ELBEs by NAICS codes
- D. Percentage

The formula is:
$$\left[\frac{\text{No. of SLBE/ELBEs in a Work Category} \times \text{Weight}}{\sum \text{No. of all Firms in same Work Category}} \right] \times 100$$

The top number of the formula is based on the ready, willing and able firms who have expressed interest in doing business with the City by completing and submitting applications for certifications. The weight is calculated by dividing the dollar amount of the individual NAICS code by the total dollar amount of the estimate. Goals are developed objectively on a contract-by-contract basis and reviewed/approved by Equal Opportunity Contracting Program management staff.

Potential Improvements: 1) Establish contract-by-contract mandatory goals on all best value projects (i.e. Design/Build; Construction Manager at Risk, consultant contracts, etc.) – failure to meet mandatory goals would result in the proposal being non-responsive and will no longer be considered; 2) Eliminate good faith effort documentation on best value projects if mandatory goals are established; and 3) Include *advisory only* goals for all other types of businesses (i.e. Disadvantaged,

Minority, Woman, Disabled Veteran and Other Business Enterprises) on public works construction projects.

Bid Discounts

During FY2011, there were 11 projects within the dollar range for the 5% bid discount available for SLBEs. Two were federally funded and therefore the discount did not apply; 1 was design build and as such, the discount did not apply; 2 projects were sole sourced to non-SLBE/ELBE firms; SLBE/ELBE firms were the low bidder on 3 projects and there was no need for a discount; and the remaining 3 projects did not have SLBE/ELBE prime bidders.

There have not been enough discounted projects to identify any improvement at this point in time. We will continue to monitor and report.

Certification Eligibility

During the initial development of the Program staff researched federal, state, City of Oakland and San Francisco’s small business size standards. In addition, businesses were surveyed and input was obtained from stakeholder meetings to assist with determining the appropriate size standards for San Diego. Staff proposed size standards based on the information researched and feedback received.

The following are statistics regarding certification as of April 5, 2012:

Applications				
Total	Approved	Denied	Pending	Inactive
686	462	76	73	75

Approved by General Categories				
Total*	Construction	General Services	Professional Services	Suppliers
499	241	20	232	6

*Note: Totals include duplicate company values as a company can have multiple license types

We have identified two unintended consequences of the current eligibility criteria: 1) the requirement to be in business for 1 year was developed primarily with construction contractors in mind due to the risks involved with that type of business. We have received feedback from Architect & Engineering (A&E) consultants that this requirement is not necessarily appropriate as the business risks are significantly lower, owners may be long time residents of San Diego and have years of experience performing as the lead project manager for large or major projects. The current requirement excludes these potential firms from participating in the program; and 2) the financial limits for both A&E and trucking firms appear to be too low. There are 26 certified architectural firms and 1 certified trucking firm. Developing the financial criteria for these firms was challenging as the initial feedback received from surveys/meetings was inconsistent, and similar programs in other cities and the federal requirements didn’t match the needs of San Diego. A recent survey indicated that the majority of firms surveyed agreed or had no objection to raising the financial thresholds for these two categories and allowing A&E firms to be in business for 6 months.

Potential Improvement: Raise the financial eligibility requirements for A&E and trucking firms. In addition, revise the fully operational requirement for A&E firms to 6 consecutive months.

Preference Points

The Program allows for preference points for both SLBE/ELBEs and non-certified firms. The preference points were designed to incentivize non-certified firms to partner with certified firms and to provide a small balance to the advantage that larger firms have with experience, depth and size. We have received some feedback from non-certified construction firms that the preference points allocated to SLBE/ELBE firms provides an unfair advantage in design/build construction contracts. A review of the FY2011 awards indicates there were 6 design-build construction projects - 2 were awarded to SLBEs. The dollar values of these contracts were between \$152,649 (lowest) to \$936,220 (highest). A cursory review of the typical design/build contract size ranges suggests that the size of the design/build contracts the City has awarded is small. As design/build projects requires a significant amount of time, effort and resources to develop and submit proposals, it may be prudent to review dollar amounts for this project delivery method.

Regarding A&E consultant projects, the majority of proposers are including SLBE/ELBE firms at a high level, however after a proposer has been selected and the actual contract has been negotiated, the participation levels are lower than originally proposed. We are currently working with Public Works to determine the cause and identify an appropriate solution to this issue.

Potential Improvement: 1) Modify the preference point structure to include points for approved project specific Mentor-Protégé agreements to further incentivize partnerships; 2) Establish mandatory SLBE/ELBE goals on best value projects similar to MACC projects; 3) Review industry standards and prepare specific guidelines for determining use of the design/build delivery method and 4) Continue working with Public Works and report solution to address lower participation levels after contract negotiation by the end of FY2012.

Additional Potential Improvements

1. EOC "Champion" – As Equal Opportunity Contracting is a Citywide responsibility, designating a "Champion" in all departments to assist with promoting and implementing EOC requirements would be an efficient and effective measure. Each champion would be adequately trained on the policies, procedures and document processing related to EOC. They would serve as a single point of contact for each department to ask questions, expedite documents and promote equal opportunity.
2. Establish SLBE/ELBE liaison groups for construction and goods & services – One of the challenges facing SLBE/ELBE firms is a lack of direct, ongoing access to key City staff involved in the contracting and/or decision making processes. Providing such a forum would allow these firms to ask questions, discuss issues/concerns, receive updates, etc. regarding City contracts and/or contract specifications and requirements. We queried the firms in our database and there is significant interest in participating in such a group. The recently adopted CIP Transparency policy already requires Public Works to conduct quarterly outreach meetings with SLBE/ELBE stakeholders. This proposed improvement will add to that policy.
3. Increase Outreach Efforts to expand pool of certified vendors – Through the Small Business Development Pilot Program and in collaboration with resource partners and organizations, future outreach to local small businesses will be tailored and focused on attracting vendors (goods and service providers) and providing specialized training on the Small Local Business Enterprise Program in order to expand the pool of certified vendors.
4. Develop a comprehensive Supplier Diversity Strategy for goods & services – There are a variety of opportunities for SLBE/ELBEs, other City recognized certified firms and non-certified small business firms to participate and provide goods and services to the City through a supplier diversity program.

These range from obtaining verbal or written quotes directly from these small firms on those contracts that do not require a formal solicitation process to the larger annual supply agreements that could include evaluation/selection criteria on how the large majority owned firms will develop strategic alliance relationships with them in providing the goods or services to the City. The purpose of these alliances is to develop long-term mentoring relationships and /or joint venture partnerships. Purchasing & Contracting will be researching best practices, identify potential areas of goods and services contracting, host meetings to understand barriers (real and perceived) to doing business with the City and formulate a draft Supplier Diversity Strategy over the next six months.

5. Prompt Payment – We have received feedback from certified firms that additional internal discussions regarding our payment processes and procedures are necessary, particularly as it relates to change orders and billings.

6. Sunset SCOPe Program – The SCOPe Program, initially developed in FY2000 to comply with Proposition 209 was primarily an outreach program loosely based on a similar program implemented in the City of Los Angeles. While it provided a significant amount of detailed information regarding prime contractor activities, it had minimal impact on the City’s desire to ensure that all segments of its local business community have a reasonable and significant opportunity to participate in City contracts. With the increase in participation levels experienced with the SLBE Program and the potential for including advisory goals in construction projects, staff believes that the SCOPe Program is no longer necessary.

7. Update Council Policy 800-15 (Equal Opportunity Contracting) – It would be beneficial for all Council Policies that include Equal Opportunity Contracting (EOC) elements be cross referenced. The new CIP Transparency Policy contains a number of EOC related components that need to be cross referenced in 800-15. In addition, it would be prudent to review and update the overall policy with the assistance of the Independent Budget Analyst and Citizens Equal Opportunity Commission.

8. Revise Council Policy 900-15 (Small Business Enhancement Program) – To ensure sufficient levels of service, training, and technical assistance is provided to an increased number of small businesses participating in the Small Business Development Pilot Program, staff proposes to seek an adjustment to SBEP allocations outlined in the Council Policy for specialized technical assistance, training and pilot program services provided by the San Diego Contracting Opportunities Center. Funding for the Small Business Development Pilot Program is allocated through the Small Business Enhancement Program (Council Policy 900-15).

9. Update Debarment Proceedings in Municipal Code – The existing Debarment Code was last amended in 2005. The EOC related information included in the code needs to be updated. In addition, it provides limited latitude for the length of debarment (minimum of 3 up to 5; permanent for certain actions). We have been working with the City Attorney’s Office regarding updates to the code.

CONCLUSION

The above potential improvements could further strengthen and refine the Small Local Business Enterprise Program. They rely on a four-pronged approach to improving supplier diversity – 1) improved outreach to build the volume of prospective contractors; 2) providing technical assistance and direct access to City staff; 3) providing elements of restricted competition and evaluation preferences, where appropriate; and

4) continued stakeholder input to identify ways to make it easier to do business with the City. They were developed based on a review of the impacts of the current program, similar programs in other cities (the City of Oakland's revised Local and Small Local Business Enterprise Program, San Francisco Local Business Enterprise and Non-Discrimination in Contracting Ordinance), the Insight Center for Community Economic Development's 2012 Inclusive Business Initiative "Public Contracting in the Proposition 209 Era", U.S. Small Business Administration's Small Business Size Standards and State of California's Small Business Certification Eligibility Requirements.

In addition, we conducted a brief survey of our SLBE/ELBE firms regarding the existing program and potential improvements. We received beneficial feedback from the firms that responded to the survey, however, it was a small sampling (78). Additional stakeholder meetings are critical to obtaining feedback to assist with the preparation of a final list of recommended improvements. We anticipate scheduling several meetings and presenting the results prior to the end of this fiscal year. The attached matrix, which was shared and briefly discussed at the Citizens Equal Opportunity Commission's April 4th meeting, provides a summary of the potential changes discussed in the report.



Debra Fischle-Faulk, Director
Administration Department

Approved: _____



Wally Hill
Assistant Chief Operating Officer

- Attachments:
1. City Attorney Memorandum dated February 27, 2012
 2. Small Local Business Program Potential Improvements
 3. Current Good Faith Effort Requirements
 4. Debarment Code