CITIZENS' EQUAL OPPORTUNITY COMMISSION

MINUTES

Wednesday, August 4, 2004
6:00 p.m.

City Administration Building
Council Committee Room
202 C Street
12th Floor
San Diego, CA 92101

ATTENDANCE: Arthur Cribbs, Audie de Castro, Debbie Day, Mike McManus, Dan Salas (Chair), Brad Barnum, Julia Legaspi, Sharon Marshall, Eileen Chaske, and Sarah Young

CITY STAFF: Stacey Stevenson, EOC; Michelle London, EOC; and Susan Cola, City Attorney

GUEST SPEAKERS: San Diego Police Department: Lt. Marvin Shaw (BPOA), Lt. Manuel Rodriguez (NLPOA), Officer Vernon Kindred (BPOA), Officer Mike Shiraishi (Pan Pae POA), and Sgt. Carlos Medina (NLPOA)

Item 1: CALL TO ORDER: The meeting was called to order at 6:10 p.m. by Chairperson Dan Salas.

Item 2: APPROVAL OF THE AGENDA AND MINUTES: Today's agenda was unanimously approved. The minutes from July 7, 2004 were approved with the following correction.

Correction:

... Item 11: CHAIR'S REPORT:

- Commissioners Salas, McManus, Cribbs, and Stacey Stevenson (City of San Diego) met with City Manager Ewell and briefed on the City Manager's presentation to CEOC and what CEOC could do for the City...

Item 3: PUBLIC COMMENT: There were no public comments.

Item 4: ACTION - Follow-up to the February 4, 2004 discussions on the status of the promotional process for the San Diego Police Department (SDPD): Officers Lt. Marvin Shaw (BPOA), Lt. Manuel Rodriguez (NLPOA), Officer Vernon Kindred (BPOA), Officer Mike Shiraishi (Pan Pae POA), and Sgt. Carlos Medina (NLPOA) gave a PowerPoint presentation with the latest statistics for new hires and promotions, by race. Also, resulting from the recent lawsuit, a brief description was given on the new promotional interview process. *(Handout: PowerPoint Presentation "Leadership Challenges Update, July 2004")*

Item 5: PRESENTATION - The November, 2004 Strong Mayor ballot measure, presented by Rick Duvernay, Deputy City Attorney: City Council recently approved the Strong Mayor ballot proposal for the November 2, 2004 ballot. (*Handout: Proposed Ordinance to Place Charter Amendments on the Municipal Election Ballot for "Strong Mayor Trial Form of Government")*

Notes:

City of San Diego has operated under current charter since 1941 as a City Manager form of government. There have been several attempts to make San Diego a Strong Mayor form of government since then.

The Mayor, today, is the gatekeeper of the legislative process: he controls the council committees and the legislation passed by the council. What the Mayor is prohibited from doing, as well as the council, is performing the executive functions. The City Manager is the Chief Executive Officer and is responsible for handling the administrative affairs of the city and the city's day-to-day business.

Under a Strong Mayor form of local government, the Mayor would have the power of Chief Elected Officer (currently has) plus the power of Chief Administrative Officer. If passed, this Strong Mayor form of government would not go into effect until January 1, 2006. The delay is needed to address the Council policies and municipal codes that would need to be changed.

The Mayor would no longer be a part of the legislative body. There would still be eight (8) council members. The Mayor's role would be more like that of the City Manager, he would control the city departments, appoint the department directors, and would make recommendations to the City Council with respect to the legislative actions before them.

The council would be autonomous (independent) from the Mayor in controlling the legislative agenda of the City. The council will have the ability to establish committees as they see fit and control the docket.

The Mayor would retain the ability to veto certain actions of the City Council, such as policy and legislative matters. The Mayor will not be able to veto actions that are unique to government issues of the City Council.

Item 6: REPORT- Status of the City's Subcontractor Outreach Program (SCOPe) and proposed Five Percent Bid Preference Program, presented by Stacey Stevenson, Equal Opportunity Contracting (EOC): Ms. Stevenson reported that the SCOPe update is scheduled to go before the Natural Resources & Culture (NR&C) Committee on August 11, 2004. The last SCOPe update given to NR&C was on July 30, 2003. *(Handout: Manager's Report to Natural Resources & Culture Committee, re: "Update on the Subcontractor Outreach Program (SCOPe) Language and Administration," no date)*

Item 7: REPORT - Proposition 209: Recent court rulings, presented by Susan Cola, Deputy City Attorney: Ms. Cola discussed the summaries of three Equal Opportunity Contracting cases; two cases involving San Francisco, and one case from Sacramento. *(Handout: "Summary of Recent EOC Cases," August 4, 2004)*

Item 8: ACTION - Construction Manager (CM) at Risk Update, presented by Stacey Stevenson, Equal Opportunity Contracting (EOC): Enacting language is currently being drafted. Jon Dunchack will meet with industry representatives and make a report to the Commission in the near future.

Item 9: ACTION - Revisit the role and need for Special Session Workshops: Stacey Stevenson has been working on revising the meeting day/time of the Special Session Workshops. Not all Commissioners have submitted their schedule for availability at this time. Based on what has been received so far, Ms. Stevenson said the 2nd Wednesday of the month could possibly work, but still would not incorporate all Commissioners.

It was also concluded that at each regularly scheduled business meeting, it would be determined if a Special Session Workshop would be scheduled for that month.

Item 10: CHAIR'S REPORT: There were no items to be reported.

Item 11: ADJOURNMENT: The meeting was adjourned at 8:12 p.m.

/mll

SUMMARY OF RECENT EOC CASES

August 4, 2004

(1) Coral Construction v. City and County of San Francisco, 116 Cal. App. 4th 6 (2004)

HOLDING: Contractor's standing to challenge ordinance did not depend upon identification of specific contract on which it would bid in the near future. Therefore, contractor established standing.

SUMMARY: Contractor on public projects filed an action against the City, challenging the constitutionality of the city ordinance on utilizing women's, minorities', and local businesses. The Superior Court, San Francisco County, granted City summary judgment on the grounds that the Contractor had failed to prove it would be bidding on an identifiable City contract subject to the Ordinance in the reasonably near future. The Contractor established that (1) City occasionally put out contracts for the specialized work done by the Contractor, (2) at least some of these contracts were covered by the ordinance, (3) the Contractor had bid on at least one such contract as a prime contractor, (4) the Contractor suffered an actual injury as a result of the application of the ordinance, (5) the Contractor stood ready, willing, and able to bid on future contracts, and (6) under the ordinance, when Contractor bid, it would be forced to compete on an unequal basis. The Court of Appeal, First District, reversed and remanded, holding that to have standing to challenge allegedly discriminatory ordinance on public projects, "the petitioner need not demonstrate it will lose a contract bid under the ordinance; rather, the petitioner-contractor must show that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors."

COMMENT: The Court's holding is significant because it essentially opens the door for any contractor likely to bid on City projects to file a discrimination claim.

(2) Coral Construction, Inc. v. City and County of San Francisco, Case No. 421249, 7/26/04

HOLDING: The City's public contracting policies and practices of Chapter 12D.A. of the San Francisco Administrative Code, on their face, violate Article 1, section 31 of the California Constitution, passed by the voters through Proposition 209 because the City's contracting policies grant preferences to minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs) solely because of race, sex, color, ethnicity, or national origin.

SUMMARY: City adopted the current version of its Ordinance to combat the City's own active or passive participation in discrimination against minority and women owned businesses, both in its own contracting for goods and services and in the private market for such goods and services. City found that women and minority owned businesses were virtually excluded as contractors on prime City contracts, based upon the testimony of 42 live witnesses, 127 submittals, and statistical dada established that some City departments operated under the "old boy network" when awarding contracts.

The features of the ordinance at issue are as follows:

1. Bid Discount Program - Under the City's Bid Discount Program, City departments must give specified percentage discounts to bids for certain City contracts submitted by MBEs and WBEs, as well as joint ventures with appropriate levels of MBE or WBE participation.[1]

2. Subcontracting Program – The City's subcontracting program has a quota option that requires prime contractors to provide a list of all minority- and women-owned subcontractors to be utilized for the project, specifying for each the dollar value of the participation and

[1] An MBE is defined as "an economically disadvantaged local business that is an independent and continuing business for profit, that performs a commercially useful function, is owned and controlled by one or more minority persons residing in the United States or its territories and is certified as an MBE pursuant to Section 12D.A.6(B)." A WBE is defined as "an economically disadvantaged local business that is an independent and continuing business for profit, that performs a commercially useful function, is owned and controlled by one or more women residing in the United States or its territories and is certified as an MBE pursuant to Section 12D.A.6(B)."

the work to be performed by MBEs and WBEs. If the prime contractor fails to obtain the specific dollar percentages of the work to be performed by MBEs or WBEs, the prime contractor's bid will be rejected as non-responsive unless the contractor submits evidence that it has taken specific steps to recruit subcontractors who are MBEs and WBEs.

3. Special Advantages to MBEs/WBEs – the Ordinance requires City departments to provide special notices of future public contracting opportunities to MBEs and WBEs. It also grants other special competitive advantages not provided to non-MBEs or non-WBEs. The Ordinance also provides that the authorities that award City contracts must: "Use good-faith efforts for all contracts subject to bid/ratings discount provisions of this ordinance to solicit and to obtain quotes, bids or proposals from MBEs and WBEs on all solicitations, or document their unavailability."

The Superior Court relied primarily on the California Supreme Court's holding in *Hi-Voltage Wire Works v. City of San Jose* (24 Cal. 4th 537 (2000)) for the proposition that the Ordinance violates section 31 of the California Constitution. While not rejecting or contesting the validity of the City's findings with regard to its past discriminatory practices, the court rejected the City's argument that it could act remedially when it has intentionally discriminated in the past because the clear intent of Proposition 209 is to abolish any type of race- and sex-conscious program adopted by the City, regardless of its moral probity.

COMMENT: This case highlights the distinction between federal equal protection principles, which may permit a race- or gender-based program (under a strict scrutiny analysis) to remediate past discriminatory practices and section 31 of the California constitution, which categorically prohibits such classifications.

(3) United Utilities, Inc. and C & C Construction, Inc. v. Sacramento Municipal Utilities District, 00AS03306, 1/8/02

HOLDING: Sacramento Municipal Utility District's (SMUD) 1998 Equal Business Opportunity Plan (EBOP) violates Proposition 209 because SMUD failed to establish that EBOP was necessary to establish or maintain

eligibility for any federal program, as required by Subsection (e) of Article 31 of the California Constitution.

SUMMARY: Article 31, subsection (a) states that: "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national original in the operation of pubic employment, public education, or public contracting." Article 31, subsection (e) states that: "[n]othing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." SMUD conceded that its contracting scheme uses race conscious "participation goals" and in some cases "evaluation credits" that would violate subsection (a) unless subsection (e) applied. At issue in this case was the proof required to establish that EBOP was necessary to establish or maintain SMUD's eligibility for federal funding.

In essence the court found that SMUD must do more than merely show that federal law permits programs such as the EBOP. SMUD must show that the otherwise impermissible preferences of the EBOP "must be taken to establish or maintain eligibility" for federal funds. In addressing this issue, the court made the following observations: (1) SMUD offered no evidence of any express contractual conditions that make approval of federal funds for a project contingent upon the EBOP; and (2) SMUD offered no evidence from federal agencies requiring the use of EBOP or indicating that the failure to use EBOP will result in the loss of federal funds. The court acknowledged that federal agencies like the Department of Energy and Transportation certainly require grantees to adhere to Title VI's race and gender-blind mandate and under certain circumstances to take affirmative action to remedy past discrimination, but rejected SMUD's position that it could rely on its own belief and understanding that federal funds could be withdrawn if it did not adopt an EBOP to remedy statistical disparities in the number of MBEs/WBEs awarded contacts. Notably, the court observed that the federal grantor agencies empowered to enforce Title VI by withdrawal of funds could not terminate funding without an administrative hearing and judicial review.

COMMENT: This case is significant because it has been appealed to California Court of Appeal, Third District, and is a likely candidate for further appeals regardless of the outcome. Until final resolution, public

agencies should view this case as a good indicator of how other courts are likely to view an awarding agency's attempt to shield itself under the Subsection (e) exception absent express contractual wording that a gender- or race-based program is necessary to establish or maintain federal funding (for example, the DBE program required by the Department of Transportation for certain transportation projects) or, at a minimum, an administrative order by a federal agency that a race- or gender-based program is necessary to remedy a past or present discriminatory practice prior to withdrawal of federal funding.