THE CITY OF SAN DIEGO

CITIZENS' EQUAL OPPORTUNITY COMMISSION
REGULAR BUSINESS MEETING

MINUTES

Wednesday, July 15, 2009
6:00 P.M.
City Administration Building
Council Committee Room
202 C Street – 12th Floor
San Diego, CA 92101

ATTENDANCE: Commissioners:
Rebecca Llewellyn, Daniel Salas, Eileen Chaske, Debbie Day, Maurice Wilson, Dr. Shirley Weber, Bradford Barnum, Stampp Corbin, Dr. Sarah Young

MAYOR'S STAFF: Sanna Singer - Deputy City Attorney, Nathan Slegers - Deputy City Attorney, Debra Fischle-Faulk – Director of Administration, Hildred Pepper – Director P & C, Terrell Breaux - EOC Supervisor, Ronald White - EOC Associate Management Analyst, Laura Davis - EOC WPO

PUBLIC SPEAKERS: Bernard Johnson

Item 1: **CALL TO ORDER:** 6:09 p.m. by Chairperson Rebecca Llewellyn.

Item 2: **APPROVAL OF JUNE 10, 2009 MINUTES & TODAY'S AGENDA:**

MOTION: To approve the June 10, 2009 Minutes and Agenda for July 15, 2009

Made by: Commissioner Stamp Corbin
Second by: Commissioner Maurice Wilson

VOTE: **PASSED** (Yea-6; Nay-0)

Item 3: **PUBLIC COMMENT –** $800 airport expansion funds:

Mr. Johnson introduced himself as a business man with 15 years experience doing business with other minority implemented programs and advisory boards, statewide as well as local. In regards to the San Diego Airport terminal expansion contract, the Small Business Utilization Program, staff killed the efforts of others by letting Turner Construction and others call the shots on the contracting program. We have no problem with who won the contract we think they are the most qualified contractors to do the expansion. However they created a program that allowed the contractors to do their good faith effort. Their good faith effort stemmed out to small business corporations to come in and help them run their contracting opportunity program which is basically the key to their small business program. I was a part of one of the teams and went through several interviews. I kept hearing a lot of conflict between the other firms that were interviewing as well. There was a three way tie for the community outreach service part of the contract. Teams were to compete for selection of a portion of the $800 million contract. Having gone through the process only to have the program snatched away, they did not award to any of the three tied firms. Staff made a recommendation to have Turner and another contractor run the program. We know that Turner and the others are in the business of building airports, not in the business of reaching out to the community small businesses, especially after going through a planned program process only to be recommended that airport staff along with Turner staff run the outreach program. We think this is an insult to the small business of San Diego.

None of the businesses will benefit from the earmarked monies identified for airport expansion construction because they effectively killed the program to identify small businesses that could have participated in the expansion. Just trying to get the message out that if the process continues to be unfair, minority programs will continue to be killed. I have worked with redevelopment agencies here to put together programs to allow minority businesses to participate. We know eighty percent of businesses are small and run this country. Funds are not going to make it to Martin Luther Promenade, Chinatown, and Caesar Chavez Street. The airport is another example of cheating the citizens and small businesses of the opportunity to participate. Efforts are not being made to spread the word, get businesses certified and how to do business with agencies. The money is not doled out to small business.

Commissioners opened a discussion on Mr. Bernard Johnson commentary.

Chair Rebecca Llewellyn: Are there any questions or comments from the commissioners?

Commissioner Barnum: Has the Airport Authority Board approved the award yet?

Mr. Johnson: I did not attend the board meeting, one of my associates did. From his observation there were several board members outraged by this process. We are trying to get some momentum to get them to at least honor the program. Select a firm that's going to help spread the word. I have been working with CALTRANS forever with their small business program to get small businesses certified. That is the bottomless pit in terms of getting money. You can get certified but that's not going to guarantee to get you money. We also educate firms on how to do business with agencies. If we continue to get our feet ripped out from under us, small business might as well shut their doors. I do most of my business outside of the state because I cannot get business in San Diego. I live in San Diego, I love San Diego and I fly into the airport. I thought I would be able to work on the expansion.

Commissioner Salas: Was an explanation given as to why?

Mr. Johnson: Staff said that none of the firms that had participated in the interview process had the capacity. I take offense to that. I do large acquisition projects for utility companies throughout the country. I know very well what the participation is. I do a lot of business in the southern parts of the US. I came here 25 years ago and San Diego was way behind in civil rights and when I did redevelopment they did not have a small business program. Now we have the EOC program together, we've made some strides. California continues to be a business segregated state.

Commissioner Sarah Young: Asked what would you like us to do about this situation because I am flabbergasted?

Chair Rebecca Llewellyn: Asked the City Attorney does this fall under the City of San Diego? Can we write a letter?

City Attorney Singer: Responded there is nothing stopping you from writing a letter or expressing in a resolution that it has come to your attention what has occurred.

Commissioner Debbie Day: Asked Do you remember who it was that did the outreach on Petco Park?

Commissioner Barnum: Responded I believe it was Herman Collins.

Commissioner Debbie Day: Commented I would assume he is a small business. I think he did an excellent job. I would think the ballpark had a pretty large price tag on it.

Mr. Johnson: Stated the groups that made presentations to the airport were all small businesses. Our group had nine businesses; we were a consortium that covered every aspect of that contract. Marketing, business outreach and lobbying. We covered every aspect of it. The project manager of our team has worked on billion dollar projects throughout the state. We had the experience and the knowledge. We worked with Turner before so we know what their temperament is and we also know……..

Chair Rebecca Llewellyn: We have to move the agenda along. I am sorry but we can put it on the next meeting's agenda.

Mr. Johnson: The City of San Diego airport belongs to all of us. When we allow an agency to back away from the opportunity to expand the small business opportunity, we all lose. Thank you very much.

Item 4: **ACTION ITEMS**: Small Local Business Enterprise Program

Chair Rebecca Llewellyn: The next item is the Small Local Business Enterprise Program. Do we have a report on how that has moved or changed since we last met? Is Debra Fischle-Faulk going to be here tonight to give us a report on that? Does anybody know? We will hold that and see if she comes in.

Item 5: **DISCUSSION ITEM**: San Diego AGC lawsuit against Caltrans race and gender goals

Chair Llewellyn: The next item: San Diego AGC lawsuit against Caltrans race and gender goals.

Commissioner Corbin: Stated that, before beginning the discussion, if any commissioners have a conflict of conflict of interest, they may want to recuse themselves.

Commissioner Barnum: Stated he willingly recused himself in order to be able to clarify AGC position.

Commissioner Corbin: Requested that Commissioner Barnum's comments be noted as member of the public and not as CEOC commissioner and be limited to 3 minutes. Because it is a conflict of interest with you being an executive with the AGC and in the process of suing CALTRANS.

Commissioner Day: Can we get Sanna's (City Attorney) opinion on that?

City Attorney Singer: I don't know what the rule is with respect to the discussion item in terms of recusing, I am not sure but will make a couple

of phone calls. You can go to another discussion item. If I can't get an answer tonight perhaps we should continue it.

Commissioner Salas: I respectfully suggest that we should follow Mr. Barnum's lead if he feels that in order to avoid the appearance of impropriety he should recuse himself. We don't need a legal opinion on whether his recusal was proper. We might need to have an opinion on whether he should participate since the issue has been raised. I think he did the right thing to recuse himself at this point. If we want an opinion for a future time, I think that would be appropriate.

Chair Llewellyn: Stated that it does affect local transportation monies and Caltrans race and gender goals. That is why we put it on the agenda. I have copies of the lawsuit for commissioners. The lawsuit itself is pretty self explanatory. I did receive a letter from Mr. Ryan of the AGC of San Diego. AGC state chapter is not included in the lawsuit. Only AGC of San Diego which is a separate chapter from California. Other AGC chapters in the state are not going along with lawsuit. The Chair provided copies to commissioners with instructions to review and reach conclusion about lawsuit. Chair Llewellyn indicated the floor is open for discussion.

Commissioner Salas: Supported Commissioner Corbin with Barnum recusal.

Commissioner Wilson: Requested Barnum's opinion of the lawsuit and the 6.75% set aside for subs, what about the 6%? What is the conflict there? Is it unfair to you or unfair to the members? What is the real argument there?

Commissioner Barnum: Stated we are challenging the Disparity Study. We're challenging the specific criteria that supposedly is the old case of Western States Paving vs. the state of Washington. A number of points raised in the AGC lawsuit indicate that there wasn't enough evidence, and specific criteria was not reached in the Disparity Study. That's the real challenge. There are a number of instances now where CALTRANS is implementing these race conscious goals in contracts and there have been situations where there are 6.75% goals and the low bidder did not reach the goal but the fourth low did and CALTRANS is considering awarding to the fourth low bidder. That is likely to be challenged by the low bidder since they are not reaching the goal and the fourth bidder is reaching the goal. Something is happening that is allowing this to happen. Our questions are in regards to the availability of contractors.

Chair Llewellyn: Questioned whether this lawsuit is only the AGC of San Diego so I suppose you are only talking about District 11?

Commissioner Barnum: Responded that we (AGC) are questioning the lawsuit statewide and the Disparity Study and how it was done.

Chair Llewellyn: Commented that we had a Commissioner that asked for the Disparity Study disk and it has been given to all of the Commissioners. So you have one that the City of San Diego did in 1995 that most of us read at the time and had differing opinions on. In light of figures that we received recently showing San Diego reached a 2% goal, it is not a rich showing. Caltrans is not doing much better. Figures are way down. The first job that was let with stimulus money, there was a 6% goal and they made less than 1% and it was awarded to that contractor. Caltrans is supposed to make 13% overall. They will be short at the end of the year.

Commissioner Day: Asked that in the Caltrans disparity study does it include information on the availability of contractors meeting 6.75% goal?

Commissioner Corbin: Responded that I think there are significant resources in terms of registered minority businesses. They may be outside of the quote /unquote CALTRANS specific database where there are specific issues with respect to building freeways and highways that limit the world of available contractors. The lawsuit goes further than questioning, they want injunctive relief. What does declaratory and injunctive relief mean?

City Attorney Sanna Singer: Answered that declaratory relief means the plaintiff is seeking some kind of declaration from the court. Injunctive relief means they are asking court to prohibit a certain kind of action.

Commissioner Corbin: Stated that in his cursory reading, he determined that the AGC is trying to stop the program today, although questioning the program can continue, but the Ryan letter attempts to clear this up regarding the bid issuance.

Commissioner Barnum: Replied we (AGC) are asking for court to tell us if the disparity study is legal or not, that is all we are asking. We are not asking CALTRANS to stop the program.

Commissioner Corbin: Stated that I am just looking at what it says at the top of the lawsuit where it states that you are seeking injunctive relief and I do not think that I am wrong in what that means.

Commissioner Salas: Interjected that you are seeking injunctive relief and that is the argument of the lawsuit. The question is whether the court will do anything during the pendency. It is wrong to say injunctive relief is not being sought now because it is. If the City is issued a demand will they do anything different pending the final result? A whole host of items takes

place with the win of this lawsuit, and the tendency is that the City will continue with Caltrans policy until judge orders it stopped.

Commissioner Weber: Questioned Commissioner Barnum whether AGC wants to know if disparity study is "accurate or legal"?

Commissioner Barnum: Answered whether it is legal. It was not followed by the court cases Western States Paving vs. Washington State.

Commissioner Corbin: Commented that the CALTRANS Disparity Study has been out since 2006. So for the last three years no one challenged the study until the AGC decided to?

Commissioner Salas: Stated that in the historical background, DOT went before the Washington State 9th circuit court and the method was flawed. Program has to pass muster for California.

Commissioner Corbin: Stated it took six months to come up with lawsuit. We cannot seem to find diversity in San Diego between minority, disabled and other demographic groups to meet 6% criteria? We cannot find anyone in city or find someone outside. Why is it so difficult to reach 6%, why is this a challenge?

Commissioner Llewellyn: Stated that since Commissioner Barnum brought it up, this was a Disparity Study done by the City in 1995. I am wondering when AGC filed their lawsuit. Was it before this or after this?

Debra Fischle-Faulk: Stated she started with the City in 1994 as EOC Program Manager. At that time, the EOC goal based program was enjoined because of a lawsuit filed by the AGC. Voluntary goals were in place while a disparity study was conducted. Participation levels by minority and woman owned businesses fell significantly because there were no mandatory goals. The goal prior to that was approximately 20% and was being met as bids would be rejected if they weren't. Additional work was commissioned to the statistician to compile and analyze participation levels after the program was enjoined as that was not conducted in the original effort. The study was complete and results were forwarded to City Council with recommendations. Shortly after, Proposition 209 was passed which further constrained the City's ability to adopt race and gender based programs and/or policies. SCOPe was developed in response. SCOPe was somewhat based on the City of LA's Program. It does not apply to Caltrans funded projects, only city funded projects. Fischle-Faulk indicated that an updated disparity study was being considered, however the city was awaiting the results of the Coral Construction case as it had potential impacts on disparity studies.

Commissioner Salas: Interjected that about that time, right after 1995 and the Disparity Study was completed, Prop 209 came about.

Commissioner Llewellyn: Asked wasn't there a request for a new one a while back?

Debra Fischle-Faulk: Answered that there was discussion about having one and the financing of that was up for discussion but with the budget situation and initially waiting for the Coral Construction decision might have made it unnecessary for a Disparity Study. As a result of CALTRANS study, any contract that the city has with CALTRANS money, has those goals. Not only construction, but consultants as well.

City Attorney Singer: Spoke about the City and Coral Construction case pending before the Supreme Court. May be able to use disparity study notwithstanding Prop 209 awaiting Supreme Court decision.

Commissioner Young: Asked what exactly are they finding fault with this new Disparity Study? That it's flawed or the population does not match it or what?

Commissioner Corbin: Explained that it doesn't meet the criteria that was set forth for what a Disparity Study was supposed to do.

Commissioner Young: Responded I thought that was the whole point of designing a new Disparity Study?

Commissioner Llewellyn: Commented that there are a lot of professionals that say that it is the AGC's opinion. We need to move the agenda, we have several items.

Commissioner Salas: Stated that this is a full frontal assault of the Civil Rights laws of 1983. Jim Ryan's letter attempts to explain the point of the lawsuit. The lawsuit challenges the program itself and alleges it is a violation of Prop 209.

Commissioner Corbin: Stated in my opinion, I come from out of town and relatively new to the state of CA. I lived in Ohio and these things are easily accomplished when people are committed to making them happen. If they are not committed it is very difficult to get them implemented. I just don't understand why it is so difficult to get diversity into our construction programs. It wasn't difficult in Ohio, wasn't difficult in Illinois, etc only place seems to be San Diego.

Commissioner Barnum: Stated that one of the AGC responsibilities is to ensure there are no discriminatory contracting practices by contracting agencies and the contractors themselves. One of these contractors is going to get a job taken away as a result of this.

Commissioner Weber: Commented I was around in 1993. If people have the desire to do this, they will. I am outraged that anyone receiving 93% of all contracts have the audacity to cry about 6% or 7%. We need to include all diverse people. I hear it time and again at events around town. We need to express some sense of outrage in terms of the letter from the AGC. The AGC will not like any Disparity Study because they want an availability study instead.

Commissioner Llewellyn: Added that I do not feel as Chair that I should write a letter but other commissioners should. I am outraged since this is my home territory. I would like a volunteer from the Commission to write a letter.

City Attorney Singer: Interjected that you can write a letter and then the Commission must vote on accepting the findings and make it an action item.

Commissioner Wilson: Responded, you got it all, 6% is not much. Where's the equity, fair share?

Commissioner Day: Inquired about whether or not calculations for the SCOPe program are developed by an engineer.

Debra Fischle-Faulk: Stated Engineering and EOCP put together the methodology for calculating goals. An engineer determines the amount of subcontracting available on projects based on the scope of work.

Commissioner Day: Further stated that my real point is, the percentage that is feasible to be subcontracted depends on the kind of project.

Debra Fischle-Faulk: Different projects have different subcontracting opportunities. Just recently they ranged from 10% to 40%. Contractors reached all the goals.

Chair Llewellyn: Called for this item to be listed as action item next meeting. Can we have an update on the Small Local Business Program?

ACTION ITEMS: Small Local business Enterprise Program

Debra Fischle-Faulk: Provided a brief update on the status of the Program. Staff went to the Rules Committee on May 27, 2009 with a progress report

that included survey results, presentation schedule and the next steps. The City Attorney's Office also provided an opinion on legal options for small or local business preference programs. Staff was directed to work with the City Attorney and incorporate small local business subcontracting requirement in bid specifications and limit bid discounts on construction projects to contract of a certain dollar amount. Comments/feedback was provided to City's consultant and staff will work to revise the current proposal and forward it for comment to the Commission and other stakeholders.

Commissioner Stampp Corbin: Requested feedback and assurances that staff would meet with all groups. What position should the CEOC take since the state is being sued over how contracts are awarded? I think we should vote to set up an action item.

Commissioner Barnum: Stated that the program identifies several protected groups and percentages. Can we get statistics here in San Diego of how many in these groups have the capability of doing CALTRANS work?

Debra Fischle-Faulk: Responded that CALTRANS has a database that can be searched.

Commissioner Barnum: If there are not 6.75% of these classes in San Diego County, how can a contractor meet that?

Debra Fischle-Faulk: Responded that they don't have to be in San Diego County.

Debra Fischle-Faulk: Further stated that I am looking at statistics from the Redevelopment agencies because they have negotiated contracts. There are resources available at all the pre-bid meetings. She stated she is continuing to meet with the City's Small Business Advisory Board to obtain additional feedback.

Commissioner Corbin: Stated I want to make the letter an action item. He asked Commissioner Barnum how the companies that reached the goal complied vs. the others.

Commissioner Young: Asked is there a penalty for not using the subs you say you are?

Debra Fischle-Faulk: Responded, yes you must list subs who will receive ½ of 1% or more and request permission to substitute. Extremely long process to debar. One successful debarment of over 1 year.

Item 6: **STAFF REPORT**: Beth Murray, Deputy Director, Economic Development Division.

Absent, written list of CBDG contracts from Ms. Murray;

Chair Llewellyn: Commented that she was very disappointed Ms. Murray not here. A real slap in the face after waiting several months. Asked if invitation can be sent to Director Bill Anderson for meeting next time?

Debra Fischle-Faulk: Responded that she would ensure he attends.

Chair Llewellyn: Questioned how much business are people getting? Where is the money and how it was spent? Something is missing. The awards increased, CBDG reimbursement decrease, $25,000-110,000 then use the $25; but not the $110,000 request for written report with results.

Commissioner Weber: Questioned that if money not used for 2-3 years what happens? Does the grantee give it back or get increases and use the lesser amount or give it back to be reprogrammed.

Debra Fischle-Faulk: Answered that money disbursed after grantee files satisfactory paperwork. Get awardee to do the work, demonstrate in writing and city provides small advance. Grantee provides paperwork to staff satisfaction or they do not get paid based on reimbursement. If not unused the money goes back. Next month's meeting clarification of written report.

Item 7: **SUBCOMMITTEE REPORT**:

Commissioner Dr. Young: Reported she attended Kevin Stark's memorial at military chapel. She presented letter from Councilmember Carl DeMaio of recognition of his volunteer service. Council meeting was also adjourned in Mr. Stark's memory. He was only leader of disabled service employees' annual fundraiser. She gave brief Navy career bio leading to disabled services and annual fundraiser. Commissioner Young indicated her willingness to start a volunteer program when termed out 2010. She asked the other commissioners to help start an Office of Volunteerism.

Item 8: **COMMISSIONERS ANNOUNCEMENTS**:

No announcements.

Item 9: **CITY ATTORNEY REPORT**:

City Attorney Singer: Indicated no report. She stated in cautionary

terms that no collaboration or discussion of majority of Commission on the content of letter should occur before the next meeting.

Commissioner Barnum: I plan to attend but not vote.

Commissioner Salas: Mentioned the AGC lawsuit in the early 1990's disparity study where city was determined to be a passive participant in construction discrimination. We all now have a copy of the disparity study thanks to Beryl Rayford.

Item 10: **CHAIR'S REPORT**:

Nothing additional to report.

Item 11: **ADJOURNMENT**:

MOTION: To adjourn at 7:35 p.m.

Made by: Commissioner Daniel Salas
Second by: Commissioner Eileen Chaske

VOTE: **PASSED** (Yea-6; Nay-0)