

OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

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Rules Committee Agenda Date: August 1, 2007

Item Number: 1

Item: Equal Opportunity Contracting Program

OVERVIEW

On May 5, 2007 the City Council's Budget Review Committee heard the proposed Purchasing and Contracting budget for FY 2008. At this meeting several Council members expressed concern with the lack of statistics available to track the performance of Equal Opportunity Contracting (EOC) and the level of outreach efforts. The department acknowledged that it was asked to re-examine the EOC Program in October 2006 and indicated that it would make recommendations to improve the EOC Program by the end of FY 2007.

Shortly thereafter, on May 21, 2007, Council President Pro Tem Anthony Young issued a memorandum reiterating his concerns with the EOC Program's "lack of data collection and reporting during the last two fiscal years." The memo also addressed issues brought forward by a member of the public on May 15, 2007, and specifically requested responses to four informational items related to program outreach, monitoring, data collection, and the impact of BPR on program efforts. (Please see attached memo.) The issues raised by the public speaker included clarification on data collection and monitoring in relation to Proposition 209, the City's compliance with Municipal Code §22.3501-§22.3517 "Nondiscrimination in Contracting," and the potential loss of federal funding from federal programs that require preferences such as set-asides, quotas and goals. The department will address these issues at the Rules Committee meeting of August 1, 2007.

FISCAL/POLICY DISCUSSION

The purpose of this report is twofold: (1) to provide contextual information related to relevant sections of California State law, the San Diego Municipal Code, and Council Policy 300-10; and (2) to provide preliminary comparative data on Equal Opportunity related programs and outreach efforts in six other large California cities. This information will set the stage for a discussion of San Diego's current EOC program and help to elicit new ideas on municipal contracting programs and outreach efforts designed to encourage participation by disadvantaged businesses in the local community.

California State Law

California State law specifically restricts equal opportunity programs and outreach efforts pursuant to Article 1, Section 31 of the California Constitution, or commonly referred to as "Prop 209." Under these provisions, passed by the voters in November 1996, the City shall not "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." In practice, Proposition 209 banned affirmative action programs using percentages, quotas, or set-asides to meet race- and gender-based diversity goals. Exceptions are made, however, for actions "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."

The City Attorney issued Opinion Number 97-2 on October 20, 1997 to address the effect of Proposition 209 on San Diego's Equal Opportunity Contracting programs. The City Attorney concluded that Proposition 209 does not "prevent the City from: (1) investigating contractors to ensure they do not engage in unlawful discrimination, or (2) taking steps to remedy individual, proved cases of discrimination. Nor does it prevent the City from implementing programs that maximize the opportunities for all qualified persons to be involved in and benefit from contracting with the City."

With particular reference to race- and gender-neutral outreach and contracting programs the City Attorney opined that such programs "may still encourage the involvement of MBEs and WBEs, and even advise contractors of the levels that the City anticipates such involvement would reach, so long as the efforts to involve MBEs and WBEs are truly voluntary and there is no consequence when a firm fails to meet the anticipated levels."¹ The opinion continues to state that "nothing precludes the City from imposing greater race- and gender-neutral outreach requirements on contractors generally."

Under these restrictions, the City has developed several programs including the Business Opportunities Center, the Disadvantaged Business Enterprise, the Subcontractor Outreach Program, and the Minor Construction Program. The case law surrounding Proposition 209 has grown extensively and an updated City Attorney Opinion may be warranted to bring the City up-to-speed on further developments.

¹ An MBE is a Minority Business Enterprise and a WBE is a Women Business Enterprise. These acronyms are used frequently when referring to affirmative action and/or equal opportunity programs.

San Diego Municipal Code

The following Municipal Code provisions lay the foundation for all Equal Opportunity Contracting Programs within the City.

Municipal Code §22.2701-§22.2708

The “purpose and intent” of the Equal Employment Opportunity Outreach Program is set forth in Municipal Code §22.2701-§22.2708 to “ensure that contractors doing business with or receiving funds from the City will not engage in unlawful discriminatory employment practices prohibited by State or Federal law.” Under these provisions every contract must contain a mandatory nondiscrimination clause. Bid-winning contracts must submit a Work Force Report detailing the number of males and females in each identified ethnic group by occupational category. City staff is required to compare this data to applicable County Labor Force Availability Data. If disparity is found, an Equal Employment Opportunity Plan detailing the contractor’s “plan of action” *may be required*, although it is unclear upon what conditions the plan *is required*. This plan cannot include quotas, goals or timetables for increasing women and minority employment and cannot require the termination of existing employees. If an Equal Employment Opportunity Plan is approved by the City, the contractor must “use best efforts to comply” with the plan. The Equal Employment Opportunity Outreach Program Manager is responsible for conducting periodic reviews of contractors to ensure compliance with the Equal Employment Opportunity Plan and the absence of unlawful discrimination.

The IBA requests further information on how a determination is made to *require* an Equal Employment Opportunity Plan in the presence of disparity. Details on the frequency and procedures involved in periodic reviews should also be provided to the Rules Committee and City Council.

Municipal Code §22.3501-§22.3517

The City further illustrates its commitment to nondiscrimination in Municipal Code Division 35, entitled “Nondiscrimination in Contracting.” This policy prohibits the City from doing business with firms that unlawfully discriminate and establishes procedures to investigate discrimination complaints with appropriate remedies for sustained complaints. Contractor bid requirements and disclosure requirements are additionally stipulated to ensure nondiscrimination.

The IBA suggests that the EOC department provide feedback and further information to the Rules Committee and City Council on investigations into discrimination complaints and the staffing-levels required to perform investigations.

Municipal Code §22.16

The Municipal Code also establishes an eleven-member Citizens Equal Opportunity Commission to continually advise the Mayor, City Council, and other City agencies “of the progress being made in the Equal Opportunity Program.” The Commission is mandated by the Municipal Code to “submit written quarterly reports which evaluate the progress of the City and its agencies for review and acceptance by the Rules Committee and Council.”

The EOC Department has confirmed that the Commission holds regular, public meetings on the first Wednesday of every month with the support of EOC staff and an assigned city attorney. The IBA has not been able to find evidence of recent Citizens Equal Opportunity Commission reports to the Rules Committee or Council. The IBA recommends that the Commission prepare a status update on the progress of EOC Programs to the Rules Committee in the fall of 2007.

The collective purpose of these code provisions is to ensure that the City maintains accurate workforce data to be certain the City is not doing business with firms that unlawfully discriminate. Moreover, in practice, these sections hold contractors and subcontractors accountable through specific contract language, City monitoring and investigations, and reports to elected City officials. The IBA recommends further discussion on the enforcement and practical application of these Municipal Code provisions.

Council Policy 300-10: Reporting to Council

Council Policy 300-10, entitled “Equal Opportunity,” commits the City Council to equal opportunity activities and specifies annual reporting requirements on equal opportunity programs. (Please see the attached Council Policy.) The Policy was last amended on May 19, 1986 and is in need of updating to conform to current law and reinforce reporting requirements.

Under the Policy, the Personnel Director and agencies and corporate directors under Council direction and contract are to submit semi-annual reports on equal opportunity goals, progress, and strategies to the Rules Committee and Council. The reports are to contain sufficiently detailed data to “provide a clear and comprehensive breakdown of the workforce.” In addition, the Policy expressly requires reports from individual contractors and contract companies on the City’s Equal Opportunity programs and progress.

The department has not issued a status report since March 14, 2002. The last report to Council addressing any matter pertaining to Equal Opportunity Contracting was issued on March 2, 2005; however, this report was not an overall status update and contained EOC information limited to the Minor Construction Program. The IBA recommends the enforcement of these reporting requirements or the establishment of new reporting requirements in an updated Council Policy.

Comparison Study of EOC Programs in California Cities

The proceeding portion of this report will focus on EOC programs and outreach efforts outside of San Diego. The IBA has conducted a survey of equal opportunity programs in six, large California cities including Los Angeles, San Francisco, Sacramento, Oakland, Fresno, and San Jose. These programs have responded to the legal restrictions implemented by Proposition 209 or Proposition 209 litigation.

Los Angeles

Los Angeles implements a “Minority Business Enterprise/Women Business Enterprise/Other Business Enterprise (MBE/WBE/OBE) Subcontractor Outreach Program.” Under the MBE/WBE/OBE program, bidders for projects with an estimated value greater than \$100,000 must conduct subcontractor outreach to all available MBE/WBE/OBE businesses to perform a portion of the scope of work designated in the contract. The bidder must provide proof of outreach through Good Faith Effort documentation to be analyzed by the office of Contract Compliance. The awarded contractor is monitored by the office to ensure that the contractor is utilizing the subcontractors pledged in the bid. Penalties are recommended for contractors that substitute illegal subcontractors, unapproved reductions in the subcontract amounts, and the use of unapproved subcontractors upon the completion of the contract. The City, however, may not deny a contract award pursuant to this program, if the bidder complies with the Good Faith Effort, but does not meet anticipated levels of MBE/WBE/OBE participation.

Furthermore, Los Angeles has a race- and gender-neutral Small and Local Business Program that provides a 10% preference to small, local businesses for contracts under \$100,000. To qualify, the principal office must be located within the County of Los Angeles, the business must have a valid business license, and gross receipts from the previous fiscal year must be less than \$3 million. Most of these contracts, according to the Los Angeles Bureau of Contract Administration, are commodities-related.

San Francisco

The City of San Francisco performs equal opportunity contracting outreach through the Human Rights Commission pursuant to the “Local Business Enterprise and Non-Discrimination Contracting Ordinance” (Administrative Code Chapter 14B). This ordinance was enacted after the city lost a Proposition 209 challenge and the court required the city to change from a MBE/WBE designated program to a race- and gender-neutral, Local Business Enterprise (LBE) program. It should be noted that the LBE program is currently the subject of active litigation for violations of Proposition 209.

To benefit from an LBE designation the Human Rights Commission must certify a business under six designations: Small/Micro/Local Business Enterprise; Non-Profit Entity; San Francisco Public Utilities Commission Local Business Enterprise; Minority-Owned Business Enterprise; Woman-Owned Business Enterprise; or Other Business

Enterprise. All of these designations must meet LBE criteria, which stipulates that the firm's principle place of business has been in San Francisco for more than six months, the firm's gross income does not exceed ordinance-specific economic thresholds for its industry, and it has all required licenses.

Once eligibility is determined, the firm is entitled to a 10% bid discount or a rating bonus. The firm's designation, however, does not allow it to confer any additional benefit distinct from the other designations, but is used as a tracking device to ensure nondiscrimination. The city also sets subcontracting goals to ensure that a certain percentage of the work will be performed by certified firms.

Sacramento

After the passage of Proposition 209, the City of Sacramento's MBE/WBE Program, was converted to the race- and gender-neutral "Emerging and Small Business Development Program." This program is designed to provide equal opportunities in contracting and procurement to achieve the "City's priorities of inclusiveness, diversity, and economic development." Firms can be certified by the Office of Small Business as Small or Emerging Business Enterprises. To qualify as a Small Business the firm must be independently owned and operated in California, have 100 or fewer employees, and average annual gross receipts for the past three years cannot exceed \$12 million (the average gross receipts requirement does not apply to manufacturers). The economic thresholds for an Emerging Business are set by industry, and must not be greater than 50% of the State's Small Business Enterprise economic size standards in effect on December 1, 1998.

A 5% bid price preference is granted to Small or Emerging Businesses. In addition, certified businesses are eligible for the Sheltered Market Program, whereby contract bidders are restricted to Small or Emerging Businesses. The City sets a goal of at least 20% participation by Small and Emerging Businesses in all City contracting and procurement. Firms that exceed the Small Business thresholds are required to subcontract at least 20% of the contract to certified Small or Emerging businesses.

The City of Sacramento also conducts extensive local outreach through workshops, seminars, and classes. The Mentor-Protégé Program encourages the use of Emerging Businesses by prime contractors for the fulfillment of the 20% minimum subcontracting requirement. The Office of Small Business also hosts an annual inter-agency small business fair called "Biz Link" to encourage interaction between small, local businesses, City departments, local service agencies, and prime- and sub-contractors.

Oakland

The City of Oakland's "Local and Small Local Business Enterprise Program" is a race- and gender-neutral program aimed at supporting and empowering "the local community, especially those aspects of it that have been placed at a disadvantage in the past." Small Local Businesses are eligible for certification if they meet the threshold of 30% of the

United States Small Business Administration's Small Business Size standards, based on realized average gross revenues over the past three fiscal years. A Small Local Business must be located and doing business for at least twelve months within the City of Oakland and in possession of a valid business tax certificate. The Local Business designation differs. Local businesses do not have any size standards and may not be independently headquartered in Oakland; only a substantial business presence in Oakland is required.

The program stipulates a minimum of 20% participation for all construction contracts over \$100,000 and all professional service contracts over \$50,000. All contracts below these amounts must include at least three certified Local and/or Small Local firms in the solicitation. The 20% requirement for larger contracts must be met with a minimum participation of 10% by Local Businesses and 10% by Small Local businesses. Discounts are applied to the bid based on 1% for every 10% of contract dollars contracted out to Local and Small Local Businesses, not to exceed a 5% bid discount per contract. Participation that exceeds 50% can be banked by Local and Small Local businesses for future use, up to 2%, to be applied to project bids within twelve months of the project completion date through which the discount was earned. If a prime contractor fails to maintain the awarded levels of participation by Local and Local Small Businesses, the city may issue a penalty equivalent to the dollar amount awarded to the Local and Small Local Business, may stop the work, or both.

The City of Oakland encourages outreach to Local and Local Small Businesses through Mentor-Protégé Agreements. The mentor, or prime contractor, garners a 5% bid preference in exchange for providing mentorship to Local or Small Local businesses during a project. The Office of Contract Compliance also sends out notices inviting bids to its list of certified Local and Small Local Businesses and conducts workshops on how to do business with the City throughout the year.

Fresno

The City of Fresno does not have a program providing preference to small and/or disadvantaged businesses for City contracts. Fresno does operate a Disadvantaged Business Enterprise Program, however, this program is a prerequisite for receiving federal funding. The DBE Program does not have to conform to Proposition 209, since it is applicable to federal contracts only.

In spite of the lack of a formal program, the City of Fresno does provide local preference pursuant to Municipal Code §3.105 and §3.109 when contracting for services, bids for the purchase of materials, supplies, and/or equipment, and bids for public works construction. Local firms located within a twenty-five mile radius of City Hall are granted a 5% preference for service contracts. Local businesses within a twenty-five mile radius bidding on contracts for the purchase of materials, supplies, and/or equipment are also granted a 5% preference if the lowest responsible bid is less than or equal to \$250,000. A 0.5% preference is awarded to local public works construction bids, as long as the amount of preference is less than or equal to \$1,000, when applied to the lowest responsible bid.

San Jose

San Jose's Office of Equality Assurance adopted a post-Proposition 209 program that required contractors to utilize a specific quota of minority or women subcontractors. In *Hi Voltage Wire Works v. San Jose*, the California Supreme Court unanimously ruled that the program was unconstitutional since it violated Proposition 209. According to Nina Grayson, the Director of the Office of Equality Assurance, San Jose no longer possesses any program to address equal opportunity contracting. The city apparently debated a small business outreach program; however, it was found that the institution of such a program would require a Charter change and the proposal did not go forward. The department is currently responsible for labor compliance issues. All contractors and subcontractors, per the Municipal Code, must have nondiscrimination and nonpreference clauses; yet, the absence of this clause does not invalidate the contract.

All of the California cities surveyed by the IBA have some form of local and/or small business program that grants preference to contractors certified through the city. For the most part, these programs generally shied away from MBE/WBE distinctions. The survey results indicate that California cities have gone to great pains to ensure that equal opportunity contracting programs and outreach efforts are race- and gender-neutral in accordance with Proposition 209.

CONCLUSION AND RECOMMENDATIONS

The IBA recommends that the Rules Committee and the EOC department consider the contents of this report when discussing future program initiatives and outreach plans for equal opportunity contracting. In particular, the IBA recommends:

1. A formal, written response from the Mayor's office addressing the issues and questions put forth in Council President Pro Tem Anthony Young's memo dated May 21, 2007 (attached).
2. Request an Opinion from the City Attorney to update the Rules Committee on relevant case law applicable to equal opportunity contracting.
3. Further information on how a determination is made to *require* an Equal Employment Opportunity Plan in the presence of disparity. Details on the frequency and procedures involved in periodic reviews should also be provided to the Rules Committee and City Council.
4. EOC department feedback and further information to the Rules Committee and City Council on investigations into discrimination complaints and the staff required to perform these procedures.
5. A status update from the Citizens Equal Opportunity Commission on the progress of the EOC Program to be presented to the Rules Committee in the fall of 2007.

6. Update Council Policy 300-10 to reflect the goals of current equal opportunity programs, Proposition 209 legal requirements, and department reporting responsibilities.
7. Consider the results of the IBA survey for new ideas to enhance EOC program efforts.

[SIGNED]

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[SIGNED]

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Attachment I: Memorandum from Council President Pro Tem Anthony Young dated May 21, 2007

Attachment II: Council Policy 300-10