Date Issued: October 15, 2008   **IBA Report Number:** 08-108

Public Safety and Neighborhood Services Committee Meeting Date: October 22, 2008

Equal Opportunity Contracting Program-SCOPe Waivers

OVERVIEW

On Monday, September 22, 2008 the City Council approved modifications to the City's Subcontracting Outreach Program (SCOPe). The SCOPe program applies to City-funded construction contracts in excess of $100,000. The SCOPe program requires bidders on City construction contracts to make subcontracting opportunities available to a broad base of qualified subcontractors and to achieve a minimum subcontractor participation level. At the September 22nd City Council meeting, the Council requested that the IBA and Equal Opportunity Contracting Program (EOCP) review the SCOPe waiver provision and return to the Public Safety & Neighborhood Services Committee (PS&NS) and to the City Council for final approval.

FISCAL/POLICY DISCUSSION

At the September 22, 2008 City Council meeting, the EOCP proposed the following waiver provisions to the SCOPe program:

> "*Every construction contract bid package where City engineers estimate the costs to be in excess of $100,000 shall be submitted to EOCP for review and establishment of Mandatory Subcontracting Participation Goals and Advisory Participation Levels in advance of public release of bid documents.*
>
> *The intent of this program shall be to maximize the opportunity for subcontract participation to enhance contractor availability and to promote greater capacity development and competition in the construction industry. Accordingly, EOCP, in consultation with the City department issuing the bid, shall only consider issuing formal waivers of this program on a limited contract-by-contract basis when one or more of the following conditions is present:*

A. *Based upon a historical analysis of contracts of a similar size and industry type there are no significant opportunities for subcontractors to perform a commercially useful function of this contract;*

B. *Based upon an analysis of prior City contracts of a similar nature and current availability data, there are no subcontractors available to perform a portion of the work;*

C. *Based upon an historical analysis of contracts of a similar size and industry type, the nature of available subcontract opportunities will lead to gross inefficiencies that will significantly and adversely affect the overall cost of the project; and/or*

D. *EOCP has determined that the best interests of small contractors' capacity development will be served by suspending the Subcontracting Outreach Program placing the contract in the Minor Construction program or some other small business program, and limiting competition for the prime contract to small construction firms that are enrolled in that program.*

Final decisions regarding the applicability of this program to a contract shall rest with EOCP. In the event EOCP issues a waiver of this program's application to a given contract that program waiver and the basis for the waiver shall be clearly stated in the bid documents. Moreover, the Director of EOCP shall prepare a justification memorandum that explains the basis and factual findings supporting that waiver decision. Program waiver justification memoranda shall be submitted to the Mayor and the members of the City Council on a quarterly basis."

At the September 22nd City Council meeting, several Councilmembers expressed concerns with the waiver provision and directed that all requests for waivers be approved by the Council. Based on the City Council's direction, the City Attorney's Office modified the SCOPe waiver provision to reflect Council direction. The following paragraphs reflect the modified language as directed by the City Council. This language is currently on file with the City Clerk's Office.

"Except in the case of emergency contracts, as defined by San Diego Municipal Code section 22.3003, no waiver will be granted without first obtaining City Council approval. *In the event EOCP issues a waiver of this program's application to a given contract, that program waiver and the basis for the waiver shall be clearly stated in the bid documents. Moreover, the Director of EOCP shall prepare a justification memorandum that explains the basis and factual findings supporting that waiver decision.*

Except in the case of emergency contracts, program waiver justification memoranda shall be submitted to the Mayor and the members of the City Council prior to approval of the waiver. In the case of emergency contracts, such documentation must be submitted to the Mayor and City Council as soon as

practically possible, but in no event later than when the emergency contract is being considered for ratification by City Council in accordance with San Diego Municipal Code section 22.3212(c)."

It is the opinion of the IBA that the City Attorney's modification to the waiver provision of the SCOPe program captures the intent of the City Council as expressed at the September 22nd hearing.   Based on conversations with the City Attorney's Office, if the Committee decides to keep this version of the waiver provision in place additional Council action is not required. If the Committee decides to modify the waiver provision in any way, further Council action will be required to approve the Committee's modifications.

Implementation and operational effect of City Council approval of SCOPe waivers

The San Diego Municipal Code gives the Mayor the authority to approve Public Work Contracts equal to or less than $1.0 Million without City Council approval. Public Work Contracts over $1.0 Million require City Council approval (See San Diego Municipal Code section 22.3102). The following table illustrates the processes for City Council action on a request for SCOPe waiver depending on the dollar amount, and the possible outcomes if the Council disapproves the waiver request.   Staff from EOCP and the City Attorney's office has tentatively approved these processes.

Public Work Contract Limits	Process
<= $1,000,000 (Does not require City Council approval)	Staff will docket the SCOPe waiver for City Council action prior to advertising the project. If the SCOPe waiver is not approved the Mayor can continue to move forward with project but staff must adhere to the SCOPe program requirements.
> $1,000,000 (Requires City Council approval)	Staff will docket the SCOPe waiver for City Council action concurrently with the request to advertise and award of the contract. If the SCOPe waiver is not approved, the City Council can choose to move forward with advertising and awarding of the contract but staff must adhere to the SCOPe program requirements.

EOCP staff stated at the September 22nd City Council meeting that they have not received any non-emergency requests for waivers to the SCOPe program since they implemented an internal waiver process in February, 2008.   However, with the SCOPe threshold decreasing from $250,000 to $100,000, more projects will be reviewed and the request for waivers could increase.   In addition, public work projects under $1.0 million dollars could be impacted if there is a delay with getting the request for waiver docketed for Council action. The IBA recommends that if projects are being delayed because of the

SCOPe waiver approval process, then delays should be discussed during EOCP's quarterly update to PS&NS.

CONCLUSION

It is the opinion of the IBA that the City Attorney's modifications to the waiver provision of the SCOPe program capture the intent of the City Council.   Based on conversations with the City Attorney's Office, if the Committee decides to keep this version of the waiver provision in place additional Council action is not required. The IBA recommends that if projects are being delayed because of the SCOPe waiver approval process, that this be brought to the City Council's attention during EOCP's quarterly update to PS&NS.

[SIGNED]   **[SIGNED]**

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Attachments