Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: July 16, 2021

TO: Claudia Abarca, Interim Director, Purchasing & Contracting

FROM: City Attorney

SUBJECT: Race or Gender-Conscious Contracting Programs

INTRODUCTION

At its meeting on April 28, 2021, the Budget and Government Efficiency Committee considered a Preliminary Report on the 2020 City of San Diego Disparity Study (Study) prepared by BBC Research and Consulting. Several Councilmembers indicated a desire to rectify identified disparities by creating race or gender conscious programs.[1] As such, you have requested preliminary legal guidance on this issue under State and federal law.

QUESTION PRESENTED

May the City implement a "race or gender conscious" purchasing and contracting program that gives preferential treatment to businesses owned by members of a protected class, based on the results of the Study?

SHORT ANSWER

Yes, under very limited circumstances. The Study could be used to establish a program consistent with one of the listed exceptions to the California Constitution's general prohibition on granting preferential treatment in public contracting. Alternatively, if the City discovers evidence of intentional discrimination in the administration of its contracting programs, it may be compelled to use preferences based on race or gender as a remedy.

BACKGROUND

In November 1996, California voters approved Proposition 209 which amended the California Constitution to generally prohibit discrimination or preferential treatment on the basis of race,

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[1] *See* Study (Preliminary Report Apr. 2021) Appendix A: Definitions of Terms, page 6 (defining "race and gender-conscious measures" as "contracting measures specifically designed to increase the participation of minority- and woman-owned businesses in government contracting. […] An example of race- and gender-conscious measures is an organization's use of minority- or woman-owned business participation goals on individual contracts.")

sex, color, ethnicity, or national origin in public contracting.[2] In 2020, California voters defeated Proposition 16 which would have repealed Proposition 209.

This Office has previously analyzed the California Constitution and resulting case law in the context of implementing race or gender conscious purchasing and contracting programs. City Att'y Report 2015-11 (Dec. 16, 2015).; City Att'y MOL No. 2007-13 (Sept. 10, 2007).; Op. City Att'y 97-2 (Oct. 20, 1997). Though only the 2015 report considers more contemporary case law, the conclusions of each of these writings remain valid.

In August 2019, the City issued a formal request for proposals for an experienced consultant to conduct a disparity study to identify whether any gaps exist in the City's contracting with traditionally underrepresented groups and to suggest remediation where gaps exist. The City selected BBC Consulting to collect data related to City contracts for construction, professional services, and goods and services and to assess potential corrective measures.

Ultimately, BBC Consulting reported that non-Hispanic white woman owned-businesses, Black American-owned businesses, and Native American-owned businesses exhibited substantial disparities in some procurement types, while Subcontinent Asian American-owned businesses were generally over-represented[3]. The Study identified marketplace conditions that could contribute to the observed disparities and raised considerations for the City to apply in future policy decisions that could help rectify the issue. Study (Preliminary Report Apr. 2021).

ANALYSIS

I. THE CALIFORNIA CONSTITUTION GENERALLY PROHIBITS DISCRIMINATION AND PREFERENTIAL TREATMENT IN PUBLIC CONTRACTING.

The City, which is a municipal corporation, is subject to contracting laws and regulations intended to ensure taxpayer dollars are spent equitably and fairly. Relevant here is Article I, Section 31, subdivision (a) of the California Constitution, which requires that:

> The State 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.

This section is similar to, but not synonymous with, the Equal Protection Clause of the U.S. Constitution. *C&C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284, 293 (2004). Under equal protection principles, state actions that rely upon

[2] Three specific exceptions to the general ban are listed: bona fide qualifications based on sex; then active court orders or consent decrees; and actions necessary to establish or maintain eligibility for a federal program conferring funds to the state. Cal. Const. art. I, § 31(c)-(e).

[3] See Study (Preliminary Report Apr. 2021), Appendix E: Availability Analysis Approach, pg. 24 (defining some of these self-reported categories).

suspect classifications, such as race and ethnicity, must be reviewed under strict scrutiny standards to determine if they are based on a compelling governmental interest. In contrast, the California Constitution provides no compelling state interest exception to its ban on discrimination and preferential treatment by state and local governments. *Id*.; *Hi-Voltage Wire Works v. City of San Jose,* 24 Cal. 4th 537, 567 (2000) ("*Hi-Voltage*"). Thus, the California Constitution "prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny."[4] *Ward Connerly v. State Personnel Board, et al.,* 92 Cal.App.4th 16, 42 (2001). Accordingly, unless one of Section 31's exceptions applies, a municipal contracting program that provides preferential treatment based on race or gender violates the California Constitution. *See Hi-Voltage,* 24 Cal. 4th at 564-565.

Although the Study revealed disparities in some categories of contracting[5], there is no evidence of intentional discrimination that would permit the establishment of a program that targets persons with protected characteristics, such as race or gender. So, while the study could be used to support limited race or gender-conscious contracting under one of the enumerated exceptions to Section 31 (*i.e.*: to maintain eligibility for a federal program that conferred funds to the City), the findings are insufficient to establish a general purchasing and contracting program contrary to the prohibitions of that section.

II. THE CITY MAY IMPLEMENT RACE AND GENDER-NEUTRAL PROGRAMS.

Despite the restrictions of Section 31, municipalities continue to "have many legislative weapons at their disposal both to punish and prevent present discrimination and to remove arbitrary barriers to minority advancement." *City of Richmond v. J.A. Croson Company,* 488 U.S. 469, 494 (1989).

In California, outreach programs for the economically-disadvantaged are generally permitted, but they must be race and gender-neutral in their focus. *Hi-Voltage,* 24 Cal.4th at 565; *see also Domar Electric, Inc. v. City of Los Angeles,* 9 Cal. 4th 161, 174 (1994) (pre-Proposition 209 decision upholding a city program that required "reasonable good faith outreach to all types of subcontractor enterprises," in order to "increase opportunity and participation within the competitive bidding process"). Generally, outreach requirements that do not mandate race and gender-based participation requirements and are not overtly predicated on race and gender preferences will pass constitutional scrutiny in California. *Hi-Voltage,* 24 Cal.4th at 565-566.

The Study itself provides suggestions for race and gender-neutral measures that are permissible under the California Constitution. These are discussed in depth in Chapter 9, sections A

[4] The Study's references to the strict scrutiny standard applicable under federal equal protection case law (*see e.g.*, Study (Preliminary Report Apr. 2021) Chapter ES: Executive Summary, pg. 3-4; Chapter 2: Legal Analysis, pg. 1-5; Appendix A: Definition of Terms, pg. 1, 5, 8 ; Appendix B: Legal Framework and Analysis) could be confusing without consideration of the City's duties under the California Constitution. Federal strict scrutiny standards do not supersede or replace the California Constitution's general prohibition on purchasing programs that grant preferences based on race, sex, color, ethnicity, or national origin.

[5] The Study did not identify the City as the cause of this disparity, leaving open the possibility that prime contractors, the marketplace conditions in San Diego, or other societal factors could be the source. *See e.g.*, *Hi-Voltage,* 24 Cal.4th at 568.

("Overall Aspirational Goal") and C ("Race- and Gender-Neutral Measures") of the Study. For example, the Study suggests expanding the mandatory Small Local Business Enterprise subcontracting goals to include goods, services, and professional services contracts, or creating small business set-asides for smaller contracts. Although these suggestions would require modifications to the San Diego Municipal Code (Municipal Code or SDMC) for contracts greater than $25,000 (SDMC §§ 22.3203, 22.3203), they are otherwise permissible under the California Constitution.

The Study also suggests that the City consider unbundling large contracts to allow increased participation of all small businesses. While caution should be taken to avoid conflicts with Municipal Code section 22.3204 (Subdividing Purchase Prohibited), the suggestion is generally in alignment with the Municipal Code and State law.

Similarly, the City could quickly implement the Study's suggestion to increase the minimum number of quotes that a department would need to procure goods and services valued at up to $150,000. Although the Municipal Code mandates a minimum number of quotes, it may be desirable for departments to establish policies and regulations that are more onerous than those of the Municipal Code. The suggested regulations, assuming they do not give preference based on race or gender, would be well within the requirements of Section 31 of the California Constitution. For instance, when retaining panel counsel, the City Attorney's Office included in its evaluation process pointed questions concerning the diversity policies and practices of bidders.

Finally, it should be noted that the considerations suggested by the Study are not exhaustive. Purchasing & Contracting may wish to review the practices of other jurisdictions that are proving effective at breaking down barriers to entry for businesses that wish to participate in City contracting.

III. PREFERENTIAL TREATMENT MAY BE REQUIRED AS A REMEDY FOR INTENTIONAL STATE DISCRIMINATION.

Despite the California Constitution's general prohibition on purchasing programs that grant preferential treatment to members of a protected class, courts have not ruled out "race-specific relief" as a remedy for intentional state discrimination. *See e.g., Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 700 n.7 (9th Cir. 1997). In fact, where the state or municipality has intentionally discriminated, use of a race-conscious or race-specific remedy may necessarily follow as the only, or at least the most likely, means of rectifying the resulting injury. *Hi-Voltage*, 24 Cal. 4th at 568, citing to *Swann v. Charlotte- Mecklenburg Board of Education et.al.*, 402 U.S. 1, 46 (1971). Thus, the federal equal protection clause holds "open the possibility that race-conscious measures might be *required* as a remedy for purposeful discrimination" despite the mandate of Section 31. *Coral Construction, Inc., v. City and County of San Francisco*, 50 Cal. 4th 315, 337 (2010) ("*Coral"*) (emphasis added). However, such measures are limited to situations where: (1) the City purposefully or intentionally discriminated against businesses based on a protected class; (2) the purpose of the program is to provide a remedy for such discrimination; (3) the program is narrowly tailored to achieve that purpose; and (4) a race or gender-conscious remedy is necessary as the only, at least the most likely, means of rectifying the discrimination. *Id.* at 337-38.

The racially disproportionate impact or disparity identified in the Study is insufficient on its own to show discriminatory intent. Such "impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Instead, a racially discriminatory intent may be evidenced by factors such as the disproportionate impact, the historical background of the challenged policy, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 -268 (1977). There is no recent evidence of these additional factors to indicate discriminatory intent in the City's procurement process.

However, it is also clear "that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973). Therefore, the City must be vigilant in its duty to not engage in business with companies that use discriminatory subcontracting practices. San Diego Municipal Code § 22.3504; Council Policy 000-12; Council Policy 300-10. Failure to do so could be viewed as willful tolerance or inducement of discrimination amounting to discriminatory intent.

CONCLUSION

Although the Study did not report direct evidence of intentional discrimination by the City, it does makes clear that there is much room for improvement and offers considerations that the City may wish to further explore. In addition, the City should continue to aggressively investigate any allegations of discrimination in contracting pursuant to the City's duties under the federal equal protection clause, the California Constitution, and the San Diego Municipal Code. The Office of the City Attorney supports equitable contracting practices and programs and stands ready to assist as needed.

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By /s/ Eric S. Pooch
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