



THE CITY OF SAN DIEGO

**CITIZENS' EQUAL OPPORTUNITY COMMISSION**

**MINUTES**

Wednesday, December 7, 2011

6:00 p.m. – 8:00 p.m.

At

City of San Diego – City Hall

202 C Street

San Diego, CA 92101

12<sup>th</sup> floor Committee Room

**COMMISSIONERS PRESENT:**

Brad Barnum

Montes Jones

Laura Warner

Ron T. Cho

Gregg Torwick

Dr. Shirley Weber, Chair

**COMMISSIONERS ABSENT**

Stamp Corbin, Vice Chair    Juan Gallegos

Jay M. Montenegro

John Cloud

**MAYOR'S STAFF & Guests:**

Debra Fischle-Faulk, Administration Department Director

Henry Foster, Equal Opportunity Contracting Program Manager

Denise Sandoval, Administration Department Executive Secretary

Nooria Faizie, Deputy City Attorney

James Nagelvoort, Interim Assistant Director Engineering and Capital Projects, City Engineer

Roz Winstead, Public Speaker

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**CALL TO ORDER:** The meeting was called to order at 6:30 p.m. by Dr. Shirley Weber, Chair Corbin. All Commissioners introduced themselves for the record.

**MINUTES APPROVAL:** Agenda unanimously approved (6 yeas / 0 abstentions). Minutes from November 2, 2011 approved (5 / 1 abstention).

**NON-AGENDA PUBLIC COMMENT:** *Roz Winstead representing Women, Minority Business Enterprise. Please see attached handout marked Public Comment in right hand corner for full overview of Ms. Winsteads public comment. The report "The Path to Equal Opportunity: An investigation of Best Practices in Employment and Contracting" will be copied and distributed to the Commissioners.*

**City Attorney Presentation: Nooria Faizi**

Municipal Code 22.0801 was discussed regarding Debarment (to be provided)

Public Contracts Code was discussed regarding fines and sanctions to Contractors Illegal Substitution (to be provided).

Proposition 26 was also discussed, which would require a "Super Majority" vote due to the fact that fines would be considered a special tax.

Currently the City Attorney, EOCP, and the Administration Department are reviewing and will possibly be recommending amendment opportunities for the Commission.

Question: Has there ever been any debarments in the City of San Diego?

Answer: No, per Henry and Debra there are 2 current cases being reviewed for debarment.

Question: What is considered and illegal substitution?

Answer: One not approved by the City of San Diego. Once the subcontractor is listed they cannot change them without City approval.

Nooria Faizi, Deputy City Attorney, to prepare a statement in writing for the Commission.

**Engineering & Capital Projects Presentation by James Naglevoort**

- The presentation that was shown to the Budget & Finance Committee was provided. An overview of committee discussion regarding Streamlining CIP and possible impacts to Equal Opportunity Contracting (handout provided).

Debra Fischle-Faulk commented that it is important:

- EOCP remains in the process
- The B-Page (summary) remains in place
- There be transparency
- The process works as a process not due to the people that are running the process.

**AGENDA PUBLIC COMMENT:** *Roz Winstead had agenda comments on item 3: These comments were also attached and mark Item 3 in the right hand corner.*

There was a lot of discussion regarding the timeframe that the commission would have to put together a proactive response vs. a reactive response.

There was discussion about the length of time a project takes about resource issues and the inefficiency in the process and the staff having a reactive approach to bids.

There was discussion regarding the outreach for proposal with the AGC and EGCA.

It was explained that the response is going back to the Budget and Finance Committee and not to Council.

There was also discussion regarding the amount of time that the projects had to go back to council (up to 4-5 times) and how that was holding up the process.

Dr. Weber shared concerns regarding accountability, changing the muni. code (because that is permanent), about the Mayor leaving office soon. She also suggested that maybe this should start out as a pilot program.

Commissioner Warner shared that she agreed with the Pilot program to see if the process can perform as it is intended to perform.

It was reiterated that the 5 council members have accepted the concept of streamlining CIP and this will be going back to Budget and Finance (not Council).

Commissioner Barnum inquired about the MAAC and if they would be ready to talk about proposals. James Nagelvoort responded that it was only in the concept stage.

Commissioner Jones asked if it was known what other Cities' thresholds were, for example Los Angeles or San Francisco. James Nagelvoort responded that he did not know what their thresholds were but, that he did know that in Los Angeles they have a Council Committee just for CIP. San Diego does not have a committee like that.

Debra suggested that maybe once a month we can have one of James Nagelvoort Project Managers present a project.

Dr. Weber asked if the presentation of the project would be before or after it was awarded.

James Nagelvoort replied that it would be from the time the goals were set and before the award of the project.

Dr. Weber expressed that there definitely need to be sanctions for those who don't meet goals, it would make it easier to get projects and easier to hold people accountable.

***A request for a Special Meeting was made to discuss the response to the Budget and Finance Committee prior to the regularly scheduled meeting on Jan. 4<sup>th</sup> 2012.***

Henry Foster suggested that a strong statement would be sufficient for the response on January 25, 2012.

Commissioner Warner added that consultants were concerned with the award time. She sees a lot of benefit in what James Nagelvoort presented.

Commissioner Barnum proposed that the 1<sup>st</sup> Wednesday Meeting in January be held just for this task.

James Nagelvoort agreed to attend the special meeting to help in the composition of the response to Budget & Finance.

**Actions: None**

**COMMISSIONER ANNOUNCEMENTS/COMMENTS:** Commissioner Jones requested that a process flow chart be created from the beginning to the end of a contract.

**CHAIR'S REPORT:** Dr. Weber informed the Commission that she attended the Asian Pacific Public Affairs Association with Commissioner Cho. This organization has been around for 10 years and it provides opportunities in Government affairs. Dr. Weber took the opportunity to give a brief overview of the CEOC at the event.

**ADJOURNMENT:** Unanimously approved (6/ 0).

**NEXT MEETING:** January 4<sup>th</sup>, 2012 at City Hall.

Materials Provided:

- Minutes for November 2, 2011
- Capital Improvement Program Streamlining and Possible Impacts to EOC

**Sandoval, Denise**

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**From:** Faizi, Nooria  
**Sent:** Tuesday, January 03, 2012 2:56 PM  
**To:** Sandoval, Denise  
**Subject:** RE: Written Response to CEOC

Hi Denise,

Happy New Year to you ☺

The written summary of the information presented to the CEOC is still going through the CAO's internal review process. I will send you the memo once it is completed and approved for distribution.

Thanks,  
Nooria

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**From:** Sandoval, Denise  
**Sent:** Tuesday, January 03, 2012 2:21 PM  
**To:** Faizi, Nooria  
**Subject:** Written Response to CEOC

Hi Nooria...Happy New Year:

Can you please send me an email regarding the response to the CEOC...I need something in writing to present to the Commissioners tomorrow night.

Thank you,

*Denise  
Sandoval*

Executive Assistant  
City of San Diego  
Administration Department,  
Citizens' Review Board &  
Administrative Hearing Coordinator  
202 C Street, MS 9A  
**619-533-6387 \*\*New Number\*\***  
**dmsandoval@sandiego.gov**  
Pigs can fly! :@)

## PUBLIC CONTRACT CODE

### SECTION 4100-4114

4100. This chapter may be cited as the "Subletting and Subcontracting Fair Practices Act."

4101. The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.

4103. Nothing in this chapter limits or diminishes any rights or remedies, either legal or equitable, which:

(a) An original or substituted subcontractor may have against the prime contractor, his or her successors or assigns.

(b) The state or any county, city, body politic, or public agency may have against the prime contractor, his or her successors or assigns, including the right to take over and complete the contract.

4104. Any officer, department, board or commission taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement or in the general conditions under which bids will be received for the doing of the work incident to the public work or improvement that any person making a bid or offer to perform the work, shall, in his or her bid or offer, set forth:

(a) (1) The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid or, in the case of bids or offers for the construction of streets or highways, including bridges, in excess of one-half of 1 percent of the prime contractor's total bid or ten thousand dollars (\$10,000), whichever is greater.

(2) (A) Subject to subparagraph (B), any information requested by the officer, department, board, or commission concerning any subcontractor who the prime contractor is required to list under this subdivision, other than the subcontractor's name and location of business, may be submitted by the prime contractor up to 24 hours after the deadline established by the officer, department, board, or commission for receipt of bids by prime contractors.

(B) A state or local agency may implement subparagraph (A) at its option.

(b) The portion of the work that will be done by each subcontractor under this act. The prime contractor shall list only one subcontractor for each portion as is defined by the prime contractor in his or her bid.

4104.5. (a) The officer, department, board, or commission taking bids for construction of any public work or improvement shall specify in the bid invitation and public notice the place the bids of the prime contractors are to be received and the time by which they shall be received. The date and time shall be extended by no less than 72 hours if the officer, department, board, or commission issues any material changes, additions, or deletions to the invitation later than 72 hours prior to the bid closing. Any bids received after the time specified in the notice or any extension due to material changes shall be returned unopened.

(b) As used in this section, the term "material change" means a change with a substantial cost impact on the total bid as determined by the awarding agency.

(c) As used in this section, the term "bid invitation" shall include any documents issued to prime contractors that contain descriptions of the work to be bid or the content, form, or manner of submission of bids by bidders.

4105. Circumvention by a general contractor who bids as a prime contractor of the requirement under Section 4104 for him or her to list his or her subcontractors, by the device of listing another contractor who will in turn sublet portions constituting the majority of the work covered by the prime contract, shall be considered a violation of this chapter and shall subject that prime contractor to the penalties set forth in Sections 4110 and 4111.

4106. If a prime contractor fails to specify a subcontractor or if a prime contractor specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of 1 percent of the prime contractor's total bid, the prime contractor agrees that he or she is fully qualified to perform that portion himself or herself, and that the prime contractor shall perform that portion himself or herself.

If after award of contract, the prime contractor subcontracts, except as provided for in Sections 4107 or 4109, any such portion of the work, the prime contractor shall be subject to the penalties named in Section 4111.

4107. A prime contractor whose bid is accepted may not:

(a) Substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor in any of the following situations:

(1) When the subcontractor listed in the bid, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract for the scope of work specified in the subcontractor's bid and at the price specified in the subcontractor's bid, when

that written contract, based upon the general terms, conditions, plans, and specifications for the project involved or the terms of that subcontractor's written bid, is presented to the subcontractor by the prime contractor.

(2) When the listed subcontractor becomes insolvent or the subject of an order for relief in bankruptcy.

(3) When the listed subcontractor fails or refuses to perform his or her subcontract.

(4) When the listed subcontractor fails or refuses to meet the bond requirements of the prime contractor as set forth in Section 4108.

(5) When the prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions set forth in Section 4107.5, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

(6) When the listed subcontractor is not licensed pursuant to the Contractors License Law.

(7) When the awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the listed subcontractor is ineligible to work on a public works project pursuant to Section 1777.1 or 1777.7 of the Labor Code.

(9) When the awarding authority determines that a listed subcontractor is not a responsible contractor.

Prior to approval of the prime contractor's request for the substitution, the awarding authority, or its duly authorized officer, shall give notice in writing to the listed subcontractor of the prime contractor's request to substitute and of the reasons for the request. The notice shall be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor who has been so notified has five working days within which to submit written objections to the substitution to the awarding authority. Failure to file these written objections constitutes the listed subcontractor's consent to the substitution.

If written objections are filed, the awarding authority shall give notice in writing of at least five working days to the listed subcontractor of a hearing by the awarding authority on the prime contractor's request for substitution.

(b) Permit a subcontract to be voluntarily assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the original bid, without the consent of the awarding authority, or its duly authorized officer.

(c) Other than in the performance of "change orders" causing changes or deviations from the original contract, sublet or subcontract any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which his or her original bid did not designate a subcontractor.

4107.2. No subcontractor listed by a prime contractor under Section 4104 as furnishing and installing carpeting, shall voluntarily sublet his or her subcontract with respect to any portion of the labor to be performed unless he or she specified the subcontractor in his or her bid for that subcontract to the prime contractor.

4107.5. The prime contractor as a condition to assert a claim of inadvertent clerical error in the listing of a subcontractor shall within two working days after the time of the prime bid opening by the awarding authority give written notice to the awarding authority and copies of that notice to both the subcontractor he or she claims to have listed in error and the intended subcontractor who had bid to the prime contractor prior to bid opening.

Any listed subcontractor who has been notified by the prime contractor in accordance with this section as to an inadvertent clerical error shall be allowed six working days from the time of the prime bid opening within which to submit to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error. Failure of the listed subcontractor to file the written notice within the six working days shall be primary evidence of his or her agreement that an inadvertent clerical error was made.

The awarding authority shall, after a public hearing as provided in Section 4107 and in the absence of compelling reasons to the contrary, consent to the substitution of the intended subcontractor:

(a) If (1) the prime contractor, (2) the subcontractor listed in error, and (3) the intended subcontractor each submit an affidavit to the awarding authority along with such additional evidence as the parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening, or

(b) If the affidavits are filed by both the prime contractor and the intended subcontractor within the specified time but the subcontractor whom the prime contractor claims to have listed in error does not submit within six working days, to the awarding authority and to the prime contractor, written objection to the prime contractor's claim of inadvertent clerical error as provided in this section.

If the affidavits are filed by both the prime contractor and the intended subcontractor but the listed subcontractor has, within six working days from the time of the prime bid opening, submitted to the awarding authority and to the prime contractor written objection to the prime contractor's claim of inadvertent clerical error, the awarding authority shall investigate the claims of the parties and shall hold a public hearing as provided in Section 4107 to determine the validity of those claims. Any determination made shall be based on the facts contained in the declarations submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross-examination. The awarding authority may, on its own motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a bearing on the decision of the awarding authority.

4107.7. If a contractor who enters into a contract with a public entity for investigation, removal or remedial action, or disposal relative to the release or presence of a hazardous material or hazardous waste fails to pay a subcontractor registered as a hazardous waste hauler pursuant to Section 25163 of the Health and Safety Code within 10 days after the investigation, removal or

remedial action, or disposal is completed, the subcontractor may serve a stop notice upon the public entity in accordance with Chapter 4 (commencing with Section 3179) of Title 15 of Part 4 of Division 3 of the Civil Code.

4107.7. If a contractor who enters into a contract with a public entity for investigation, removal or remedial action, or disposal relative to the release or presence of a hazardous material or hazardous waste fails to pay a subcontractor registered as a hazardous waste hauler pursuant to Section 25163 of the Health and Safety Code within 10 days after the investigation, removal or remedial action, or disposal is completed, the subcontractor may serve a stop notice upon the public entity in accordance with Chapter 4 (commencing with Section 9350) of Title 3 of Part 6 of Division 4 of the Civil Code.

4108. (a) It shall be the responsibility of each subcontractor submitting bids to a prime contractor to be prepared to submit a faithful performance and payment bond or bonds if so requested by the prime contractor.

(b) In the event any subcontractor submitting a bid to a prime contractor does not, upon the request of the prime contractor and at the expense of the prime contractor at the established charge or premium therefor, furnish to the prime contractor a bond or bonds issued by an admitted surety wherein the prime contractor shall be named the obligee, guaranteeing prompt and faithful performance of the subcontract and the payment of all claims for labor and materials furnished or used in and about the work to be done and performed under the subcontract, the prime contractor may reject the bid and make a substitution of another subcontractor subject to Section 4107.

(c) (1) The bond or bonds may be required under this section only if the prime contractor in his or her written or published request for subbids clearly specifies the amount and requirements of the bond or bonds.

(2) If the expense of the bond or bonds required under this section is to be borne by the subcontractor, that requirement shall also be specified in the prime contractor's written or published request for subbids.

(3) The prime contractor's failure to specify bond requirements, in accordance with this subdivision, in the written or published request for subbids shall preclude the prime contractor from imposing bond requirements under this section.

4109. Subletting or subcontracting of any portion of the work in excess of one-half of 1 percent of the prime contractor's total bid as to which no subcontractor was designated in the original bid shall only be permitted in cases of public emergency or necessity, and then only after a finding reduced to writing as a public record of the awarding authority setting forth the facts constituting the emergency or necessity.

4110. A prime contractor violating any of the provisions of this

chapter violates his or her contract and the awarding authority may exercise the option, in its own discretion, of (1) canceling his or her contract or (2) assessing the prime contractor a penalty in an amount of not more than 10 percent of the amount of the subcontract involved, and this penalty shall be deposited in the fund out of which the prime contract is awarded. In any proceedings under this section the prime contractor shall be entitled to a public hearing and to five days' notice of the time and place thereof.

4111. Violation of this chapter by a licensee under Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code constitutes grounds for disciplinary action by the Contractors State License Board, in addition to the penalties prescribed in Section 4110.

4112. The failure on the part of a contractor to comply with any provision of this chapter does not constitute a defense to the contractor in any action brought against the contractor by a subcontractor.

4113. As used in this chapter, the word "subcontractor" shall mean a contractor, within the meaning of the provisions of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, who contracts directly with the prime contractor.

"Prime contractor" shall mean the contractor who contracts directly with the awarding authority.

4114. The county board of supervisors, when it is the awarding authority, may delegate its functions under Sections 4107 and 4110 to any officer designated by the board.

The authorized officer shall make a written recommendation to the board of supervisors. The board of supervisors may adopt the recommendation without further notice or hearing, or may set the matter for a de novo hearing before the board.

**Article 2: Administrative Code**

**Division 8: Debarment**

*(“Budget Estimate” added 1-22-1952 by O-5046 N.S.)  
(Retitled to “Debarment” on 4-15-1996 by O-18283 N.S.)*

**§22.0801 Statement of Purpose**

- (a) The *City* intends to accept bids or responses to requests for proposals or qualifications from, award *contracts* to, execute *contracts* with, consent to subcontracts, or do business in any way only with responsible *persons*. *Debarment* and *suspension* are discretionary actions that, taken in accordance with this Division, are appropriate means to effectuate this policy. *Debarment* and *suspension* are designed to protect the *City* by ensuring full and open competition by having contractual relationships only with responsible *persons*.
- (b) The serious nature of *debarment* and *suspension* requires that these sanctions be imposed only in the public interest for the *City’s* protection, not for purposes of punishment, and only for the grounds listed and in accordance with procedures set forth in this Division.

*(“Statement of Purpose” repealed and “Statement of Purpose” added 9-3-2002 by O-19093 N.S.)*

**§22.0802 Definitions**

All defined terms in this Division appear in italics. For purposes of this division:

*“Adequate evidence”* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

*“Affiliate”* means a *person* who:

- (a) is the assignee, successor, subsidiary of, or parent company, of another *person*; or,
- (b) is a *controlling stockholder*; or,
- (c) has the same or similar *management* of the *debarred* corporate or other legal entity; or,

- (d) directly or indirectly controls, or has the power to control, another *person*, or is directly or indirectly controlled by another *person*. Indicia of control include but are not limited to, interlocking *management* or ownership, identity of interests among *relatives*, shared facilities and equipment, common use of employees, or a business entity organized following the *debarment*, *suspension*, or proposed *debarment* of a *person* which has the same or similar *management*, ownership or principal employees as the contractor that was *debarred*, *suspended* or proposed for *debarment*, or the *debarred person* or the business entity created after the *debarment*, *suspension* or proposed *debarment* operates in a manner designed to evade the application of this Division or to defeat the purpose of this Division.

“*Bidder*” means a *person* who has submitted a bid, proposal or other document seeking award of a *contract*.

“*Contract*” means any written agreement between the *City* and another *person*. It also includes a *public works contract*. It also includes a *City* issued purchase order.

“*Controlling stockholder*” means a stockholder who:

- (a) owns more than 25% of the voting stock of a corporation; or,
- (b) notwithstanding the number of shares that the stockholder owns, has the power to direct or control the direction of the *management* or policies of a corporation.

“*Debar*” or “*Debarment*” means the disqualification of a *person* from:

- (a) bidding on a *contract*; or,
- (b) submitting responses to *City*’s requests for proposals or qualifications; or,
- (c) being awarded a *contract*; or,
- (d) executing a *contract*; or
- (e) participating in a *contract* as a *subcontractor*, material supplier, or employee of a *prime contractor* or another *subcontractor* for a period of time specified by the *Debarment Hearing Board* following a hearing.
- (f) directly or indirectly (e.g. through an *affiliate*) submitting offers for, or executing *contracts*, or subcontracts with the *City*; or

- (g) conducting business with, or reasonably may be expected to conduct business with, the City as an employee, agent, or representative of another *person*.

“*Debarment Hearing Board*” means a board established by the City to hold hearings, take evidence, and to make determinations about *debarment* for the City.

“*Department*” means a City department organized under authority of the City Manager.

“*Final Construction Contractor Performance Evaluation*” means a City-issued evaluation of a *person’s* overall performance on a *public works contract*. This evaluation is generally issued subsequent to completion of performance on the *public works contract*. It does not include *performance evaluations*, *final performance evaluations*, or *partial construction contractor performance evaluations*.

“*Final Performance Evaluation*” means a City-issued final evaluation of a *person’s* overall performance on a *contract* which is generally issued subsequent to completion of performance on the *contract*. It includes *final construction contractor performance evaluations*. It does not include *performance evaluations* or *partial construction contractor performance evaluations*.

“*Management*” means the officers, partners, owners, foremen or other individuals responsible for the financial and operational policies and practices of a *person*.

“*Partial Construction Contractor Performance Evaluation*” means a City-issued evaluation of a *person’s* performance on a specific *public works contract*. It includes only evaluations issued during performance of a *public works contract*. It does not include *final construction contractor performance evaluations*.

“*Performance Evaluation*” means a City-issued evaluation of a *person* describing the *person’s* performance on a specific *contract*. It includes evaluations issued during performance of a *contract* and *partial construction contractor performance evaluations*. It does not include *final performance evaluations* or *final construction contractor performance evaluations*.

“*Person*” has the same meaning as that in San Diego Municipal Code section 11.0210. In addition, if a *person* is a corporate or other legal entity, it includes individuals who constitute the *person’s management*. It also includes any individual or other legal entity that

- (a) Directly or indirectly (e.g. through an *affiliate*), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a *contract*, or a subcontract under a *contract*; or
- (b) conducts business, or reasonably may be expected to conduct business, with the City as an agent or representative of another *person*.

“*Preponderance of the evidence*” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

“*Prime contractor*” means a *person* who enters a *contract* directly with the *City*.

“*Public works contract*” means a *contract* for the construction, reconstruction or repair of public buildings, streets, utilities, and other public works.

“*Relative*” means:

- (a) an individual related by consanguinity within the second degree as determined by the common law; or,
- (b) a spouse; or,
- (c) an individual related to a spouse within the second degree as determined by the common law; or,
- (d) an individual in an adoptive relationship within the second degree as determined by the common law; or
- (e) any individual considered to be “family” in commonly understood terms of the word.

“*Subcontractor*” means:

- (a) a *person* who contracts directly with a *prime contractor* but not directly with the *City*; or,
- (b) any *person* under contract with a *prime contractor* or another *subcontractor* to provide any service, materials, labor or otherwise perform on a *contract*.

*Subcontractor* includes a trade contractor or specialty contractor.

“Suspend” or “Suspension” means the *debarment* of a *person* for a temporary period of time pending the completion of an investigation and any proceedings before a *Debarment Hearing Board* and any appeals therefrom.

“Willfully failed to cooperate” means:

- (a) intentionally failed to attend a hearing and/or give testimony, or
- (b) intentionally failed to provide documents, books, papers, or other information upon request of the City Manager, the *Debarment Hearing Board*, or the City Council.

(“Definitions” repealed and “Definitions” added 9-3-2002 by O-19093 N.S.)

**§22.0803 Scope of Division**

- (a) This Division establishes procedures for determining whether a *person* is to be *debarred* or *suspended*.
- (b) This Division sets forth the grounds for *debarment* and *suspension*.
- (c) This Division provides that a list of *debarred* and *suspended persons* is to be created and maintained by the City Manager. It further spells out the consequences of a *person’s debarment* and *suspension*.

(“Debarment Procedures for Procurement and Public Works Contracts” repealed; “Scope of Division” added 9-3-2002 by O-19093 N.S.)

**§22.0804 Debarment Hearing Board to be Established**

Upon receipt of a recommendation for *debarment* from a *City department*, the City Manager shall appoint a fair and impartial board called a *Debarment Hearing Board* to hear and determine whether a *person* should be *debarred*. The City Manager shall appoint three individuals to serve on each *Debarment Hearing Board*. These individuals shall be unbiased and may be City employees, but shall not be employees who have participated in the decision to recommend the *debarment* nor are subject to the authority, direction or discretion of employees or have participated in the decision to recommend *debarment*. The *Debarment Hearing Board* shall follow procedures set forth in this Division and shall make decisions based on evidence taken at a hearing. The *Debarment Hearing Board’s* scope of authority and duties are set forth in this Division.

(“Debarment Procedures for Materials, Supplies, Equipment, Insurance or Personal Service Contracts” repealed; “Debarment Hearing Board to be Established” added 9-3-2002 by O-19093 N.S.)

(1-2005)

**§22.0805      *Suspension Once City Manager Decides to Recommend Debarment***

- (a) Once a determination has been made by the City Manager that *adequate evidence* exists supporting *debarment*, the City Manager may *suspend* the *person* pending a *debarment* decision where the City Manager finds that doing so is in the public interest.
- (b) The City Manager shall notify the *person* of the *suspension* in accordance with Section 22.0806, pending the *Debarment Hearing Board* or City Council's ruling on the matter.
- (c) Once the City Manager has *suspended* a *person*, the *suspension* shall continue until the *Debarment Hearing Board* makes a final decision on the proposed *debarment* or until there has been a final ruling by the City Council following an appeal of a permanent *debarment* decision, if any appeal is filed.

*("General" repealed; "Suspension Once City Manager Decides to Recommend Debarment" added 9-3-2002 by O-19093 N.S.)*

**§22.0806      Notices**

- (a) Whenever a notice is required to be delivered under this Division, the notice shall be delivered by any of the following methods. Service is effective as described herein unless different provisions are specifically stated to apply:
  - (1) Personal delivery, service shall be deemed effective on the date of delivery; or,
  - (2) Certified mail, postage prepaid, return receipt requested. Simultaneously, the same notice may be sent by regular mail. If a notice that is sent by certified mail is returned unsigned, then delivery shall be deemed effective pursuant to regular mail, provided the notice that was sent by regular mail is not returned. Service shall be deemed effective on the date of mailing; or,
  - (3) Publication. Service shall be deemed effective on the first date of publication.
- (b) Proof of delivery of notice may be made by the certificate of any officer or employee of the City or by declaration under penalty of perjury of any *person* over the age of eighteen years. The proof of delivery shall show that delivery was done in conformity with this Division or other provisions of law applicable to the subject matter concerned.

- (c) The failure of any *person* to receive any notice served in accordance with this Division shall not affect the validity of any *debarment* proceedings.  
(“List of Debarred Contractors” repealed; “Notices” added 9-3-2002 by O-19093 N.S.)

**§22.0807 Grounds for Debarment**

- (a) A final conviction, including a plea of nolo contendere, or final unappealable civil judgment of any one or more of the grounds lists in Section 22.0807(a),(1)-(5) constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the criminal conviction, plea, or civil judgment:
- (1) under any state or federal statute or municipal ordinance for embezzlement, theft, fraudulent schemes and artifices, fraudulent schemes and practices, bid rigging, perjury, forgery, bribery, falsification or destruction of records, receiving stolen property or any offense indicating a lack of business integrity or business honesty which affects the *person's* or its *affiliate's* responsibility; or,
  - (2) for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; or,
  - (3) for violations of California Government Code sections 84300(c) and 84301 (sections of the California Political Reform Act requiring disclosure of true campaign donor), as they exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occur with respect to a City election; or,
  - (4) for a conviction under federal or state antitrust statutes involving public contracts or the submission of offers or bid proposals,
- (b) A Fair Political Practices Commission enforcement order against a *person*, either following a hearing or by stipulation, that makes a finding of a violation of California Government Code sections 84300(c) and 84301, as those sections exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occurred with respect to a City election, constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the enforcement order.

- (c) Any one of the following acts or omissions by a *person* also constitute grounds for permanent *debarment*:
- (1) the *person* committed any offense, took any action, or failed to take an action, which indicates a lack of business integrity and which could directly affect the reliability and credibility of performance of the *person* on future *contracts* with the *City*; or,
  - (2) the *person* committed a violation of San Diego Charter section 97; or,
  - (3) the *person* has committed any corrupt practice in bidding for or in any way seeking award of a *contract*, or has committed any corrupt practice in any way relating to a *City contract*; or,
  - (4) the *person* was established to, or operates in a manner designed to evade the application of this Division or to defeat the purpose of this Division;
- (d) Any two or more of the following acts or omissions by a person constitute grounds for debarment of that person for no less than three years and up to and including permanently:
- (1) the *person* unjustifiably refused to properly perform or complete *contract* work or warranty performance; or,
  - (2) the *person* unjustifiably failed to honor or observe contractual obligations or legal requirements pertaining to the *contract*; or,
  - (3) the *person* used substandard materials, or has failed to furnish or install materials in accordance with *contract* requirements, even if the discovery of the defect is subsequent to acceptance of the project and expiration of the warranty thereof, if such defect amounts to intentionally deficient or grossly negligent performance of the *contract* under which the defect occurred; or,
  - (4) the *person* committed a violation of the Drug-Free workplace Act of 1988 (41 USC sections 701-707); or,
  - (5) the *person* willfully failed to cooperate in the investigation or hearing of the proposed *debarment*; or,
  - (6) the *person* performs, or fails to perform, a *contract* in such a way that environmental damage results or a violation of environmental laws or permits is committed; or,

- (7) the *person* has not implemented its Equal Employment Opportunity Plan required by Municipal Code section 22.2705, or practices unlawful discrimination in employment, and the *person* has not taken corrective action after sufficient notice by the *City*;
  - (8) the *person* has falsified a statement of gross income submitted under the *City's* Minor Public Works Construction Project program; or,
  - (9) the *person* has committed an act or omission of so serious or compelling a nature that:
    - (a) it affects the present responsibility of the *person* to be awarded a *contract* or to participate as a *subcontractor* in a *contract*; or,
    - (b) it affects the integrity of the procurement process.
  - (10) Any one of the following acts or omissions by a *person* listed in Section 22.0807(e)
- (e) The following acts or omissions by a *person* constitute grounds for *debarment* of that *person* for no less than one year.
- (1) the *City* issued the *person* two or more *performance evaluations* from the *City* with a rating of unsatisfactory within a two-year period; or,
  - (2) the *City* has issued the *person* a *final performance evaluation* with a rating of unsatisfactory.
  - (3) the *person* has failed to timely submit bond, *contract* documents, insurance documents or any other item required by the *City*, acceptable to the *City* which conform to bid, request for proposal and/or *contract* requirements.
  - (4) the *person* who is notified that they are the apparent low bidder on a *contract* has failed to timely submit on two or more occasions complete Equal Opportunity Outreach documentation that is required by Municipal Code section 22.2705 or by policies adopted pursuant to that Division and that is acceptable to the *City*.
  - (5) the *person* submitted two or more claims of computational or other error in a bid to the *City* within a two-year period.

(“Effect of Listing” repealed; “Grounds for Debarment” added 9-3-2002 by O-19093 N.S.)

(Amended 1-24-2005 by O-19353)

(1-2005)

**§22.0808 Debarment Proceedings before the Debarment Hearing Board or City Council**

The proceedings shall be as informal as is compatible with the requirements of justice. The *Debarment Hearing Board* and/or City Council need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiries in the matter through all means and in a manner best calculated to make a just factual determination.

*(“Continuation of Existing Contracts” repealed; “Debarment Proceedings before the Debarment Hearing Board or City Council” added 9-3-2002 by O-19093 N.S.)*

**§22.0809 Debarment Hearing Board’s Authority to Debar; Debarment Hearing Board’s Decision Final**

- (a) After notice and hearing held in accordance with the procedures set forth in this Division and as further developed in accordance with policies adopted by the City Council, the *Debarment Hearing Board* shall determine whether a *person* is to be *debarred* and for what length of time. To *debar* a *person*, the *Debarment Hearing Board* must find by a *preponderance of the evidence* that one or more grounds for *debarment* stated in Section 22.0807 exist.
- (b) Except as provided in Section 22.0809(c), a *Debarment Hearing Board’s* decision shall be final.
- (c) A decision by a *Debarment Hearing Board* to permanently *debar* a *person* may be appealed to the City Council in accordance with Section 22.0810. The filing of a request for appeal of the *debarment* decision shall not stay the *Debarment Hearing Board’s* decision pending a final decision of the City Council.
- (d) The *Debarment Hearing Board* shall deliver notice of the decision to the *person* subject to the *debarment* hearing and to the City Manager.  
*(“Scope of Debarment” repealed; “Debarment Hearing Board’s Authority to Debar; Debarment Hearing Board’s Decision Final” added 9-3-2002 by O-19093 N.S.)*

**§22.0810 Appeals to City Council from Certain Decisions of Debarment Hearing Board**

- (a) If a *Debarment Hearing Board* has made a determination to *debar* a *person* permanently, that *person* may appeal that decision to the City Council in accordance with procedures set forth in this Division and procedures adopted by the City Council.

(b) A *person* who has been *debarred* may request an appeal to the City Council no later than five working days from the date of the notice of the *Debarment Hearing Board's* *debarment* decision. The *debarred person's* request for appeal shall set forth in detail the reasons why the *person* disagrees with the decision. The *person* shall file the notice of appeal with the City Clerk, who shall calendar the appeal hearing in front of the City Council after consultation with the City Manager and Mayor.

(c) The filing of a request for an appeal shall not stay the *Debarment* decision. (*"Appeals to City Council from Certain Decisions of Debarment Hearing Board" added 9-3-2002 by O-19093 N.S.*)

**§22.0811 Submission of Argument on Appeal**

(a) At the City Council hearing on the appeal, no new evidence may be presented by the City or any *person*. However, if the *person* who filed the appeal under Section 22.0810 wishes to submit argument supporting the appeal, that *person* shall submit argument in writing with the City Clerk no later than 4:00 p.m. ten calendar days prior to the date on which the hearing is scheduled to be held. Filing shall also be made on all *persons* subject to the *debarment* and on the *Debarment Hearing Board*.

(b) Where argument is submitted in accordance with Section 22.0811, the City may submit rebuttal arguments, which shall be filed with the City Clerk no later than 4:00 p.m. five calendar days prior to the date on which the hearing is scheduled to be heard. Filing shall also be made on all *persons* subject to the *debarment*.

(*"Submission of Argument on Appeal" added 9-3-2002 by O-19093 N.S.*)

**§22.0812 Standard of Proof**

The standard of proof for the *Debarment Hearing* shall be a *preponderance of the evidence*.

(*"Standard of Proof" added 9-3-2002 by O-19093 N.S.*)

**§22.0813 Imputation of Knowledge and Conduct**

(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individuals associated with a *person* may be imputed to the *person* when the conduct occurred in connection with the individual's performance of duties for, or on behalf of, the *person*, or with the *person's* knowledge, approval, or acquiescence. The *person's* acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(1-2005)

- (b) The fraudulent, criminal, or other seriously improper conduct of a *person* may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the *person* who participated in, knew of, or had reason to know of the *person's* conduct.
- (c) The fraudulent, criminal, or other seriously improper conduct of one *person* participating in a joint venture or similar arrangement may be imputed to other participating *persons* if the conduct occurred for, on approval of, or acquiescence of these *persons*.

Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

*("Imputation of Knowledge and Conduct" added 9-3-2002 by O-19093 N.S.)*

**§22.0814 Judicial Review**

Once a *Debarment Hearing Board* or the City Council has issued a final decision as provided in this Division, the time in which judicial review of the order must be sought shall be governed by California Code of Civil Procedure section 1094.6.

*("Judicial Review" added 9-3-2002 by O-19093 N.S.)*

**§22.0820 Creation of List of Debarred and Suspended Persons**

(a) The City Manager shall create and maintain a list of *persons* who have been *debarred* or *suspended* in accordance with polices and procedures of this Division.

(1) This list shall include the names and addresses of all *persons* who have been *debarred* or *suspended*.

(2) For each *debarred* or *suspended person*, the list shall state the date of commencement and expiration of the *debarment* or *suspension*.

(b) The City Manager shall establish procedures to provide for the effective use of the list to ensure that the *City* does not do business with *persons* who have been *debarred* or *suspended*.

*("Creation of List of Debarred and Suspended Persons" added 9-3-2002 by O-19093 N.S.)*

**§22.0821 Effect of Debarment or Suspension**

(a) *Persons* who have been *debarred* or *suspended* are excluded from conducting business with the *City* on behalf of themselves or as agents or representatives of other *persons* for the duration of the *debarment* or *suspension*.

- (b) *Persons* who have been *debarred* or *suspended* are excluded from submitting bids, directly or indirectly (e.g., through an *affiliate*), submitting responses to requests for proposal or qualifications, receiving *contract* awards, executing *contracts*, participating as a *subcontractor*, employee, agent or representative of another *person* contracting with the *City*, or receiving *contracts* for the period of *debarment* or *suspension*.
- (c) *Persons* who have been *debarred* or *suspended* are excluded from acting in a capacity where the *person* reasonably may be expected to submit offers for or be awarded, a *contract*, or a subcontract under a *contract*; or
- (d) *Persons* who have been *debarred* or *suspended* are excluded from conducting business, or from acting in a capacity where the *person* reasonably may be expected to conduct business, with the *City* as an agent or representative of another *person*.
- (e) The *management* of a corporate or other legal entity that has been *debarred* or *suspended* shall not conduct business or act in a capacity where they reasonably may be expected to conduct business with the *City* under a different corporate name.
- (f) The *City* shall not accept, receive, open a bid, evaluate for award, or include any proposals, quotations, bids, or offers from any *debarred* or *suspended person* for the duration of the *debarment* or *suspension*.
- (g) The *City* shall not award or approve the award of a *contract* or execute a *contract* under which a *debarred* or *suspended person* is intended to participate as a *subcontractor* or material supplier.
- (h) A *prime contractor* who is awarded a *contract* shall not employ, subcontract with, nor purchase materials or services from a *debarred* or *suspended person*;
- (i) When a *debarred person* sells or otherwise transfers to a *relative* or to any other *person* over whose actions the *debarred person* exercises substantial influence or control, then that *relative* or other *person* is automatically *suspended* or *debarred* or proposed for *debarment* to the same extent as the seller or transferor is *debarred*, *suspended*, or proposed for *debarment*.  
("Effect of Debarment or Suspension" added 9-3-2002 by O-19093 N.S.)

**§22.0822 Effect of Debarment or Suspension on an Affiliate**

- (a) If the *City* determines that a *person* is an *affiliate* of a *person* that is *debarred*, *suspended* or proposed for *debarment*, the *affiliate* is *debarred* or *suspended* to the same extent as the *person* that is *debarred*, *suspended* or proposed for *debarment*.

- (b) The *affiliate* debarred under Section 22.0822(a) may request an appeal of the decision to the *Debarment Hearing Board* by submitting a written request to the City Clerk. An appeal under Section 22.0822(b) shall be governed by the same rules and regulations in accordance with this Division as are applicable to a *Debarment Hearing Board's* procedure to *debar a person*.
- (c) The filing of a request for review under Section 22.0822(b) shall not stay the decision to *debar the affiliate*.  
(*"Effect of Debarment or Suspension on an Affiliate"* added 9-3-2002 by O-19093 N.S.)

#### §22.0823 **Effect of *Debarment* or *Suspension* by Another Governmental Agency**

If a *person* has been *debarred* by another governmental agency, that *person* may be automatically *debarred* by the City Manager permanently, or for three years, or until the other governmental agency's term of *debarment* expires, in the sole discretion of the City Manager.

(*"Effect of Debarment or Suspension by another Governmental Agency"* added 9-3-2002 by O-19093 N.S.)

#### §22.0824 **Liability for Increased Costs**

Any *person* who enters a *contract* with the City, either directly as a *prime contractor* or indirectly as a *subcontractor*, during a period of *suspension* or *debarment* imposed upon that *person* by the City under its rules and regulations shall be liable to the City for increased costs incurred as a result of replacing the *debarred* or *suspended person*.

(*"Liability for Increased Costs"* added 9-3-2002 by O-19093 N.S.)

#### §22.0825 **Effect of *Debarment* or *Suspension* on Existing Contracts**

- (a) Except as otherwise provided in this section and notwithstanding the *debarment*, *suspension*, or proposed *debarment*, of a *person*, the *City* may continue *contracts* or subcontracts it has with that *person* that are in existence at the time the *person* was *debarred*, *suspended*, or proposed for *debarment*.
- (b) If the basis of a *person's debarment* or *suspension* is so serious that the City Manager believes that termination of *contracts* or subcontracts the City has with that *person* that are in existence at the time the *person* is *debarred* or *suspended* is in the best interests of the *City*, the City Manager may take actions necessary to terminate those *contracts* or subcontracts only after consultation with the City Attorney to ensure the propriety and legality of the proposed action.

- (c) The City may continue to place orders against existing *contracts*, including *delivery contracts*, held by a *debarred* or *suspended person*, unless the *contract* has been terminated.
- (d) The City shall not renew or otherwise extend the duration of current *contracts*, or consent to subcontracts, with *debarred* or *suspended persons*, unless the City Manager states in writing the compelling reasons for renewal or extension.

*("Effect of Debarment or Suspension on Existing Contracts" added 9-3-2002 by O-19093 N.S.)*

**§22.0826 Agreement Not to Bid in Lieu of One Year Debarment**

The City may, but is not required to, offer a *person* the opportunity to execute a written agreement not to bid for one year, in lieu of the City's pursuing a one year debarment under this Division. By executing this agreement, the *person* shall consent to waive a *debarment* hearing as described in Section 22.0804, and this agreement will not constitute a debarment.

*("Agreement Not to Bid in Lieu of One Year Debarment" added 9-3-2002 by O-19093 N.S.)*

CEOC MEETING OF DEC. 7, 2011  
PUBLIC COMMENT - ROZ WINSTEAD

S/M/WBE Citizen Advocate for many years

Within the last year participated in a survey conducted by the Thelton E. Henderson Center for Social Justice at UC Berkeley, School of Law

Like to make the report available to the Commission and provide a few highlights I believe are worthy of note:

Report identifies leadership and the selection process for employees and contractors as key factors in the success of EO programs. Accurate data collection and analysis, advertising, access to capital and mentoring are also addressed in the report.

The report addresses employment and contracting issues and recommends that staff at all levels be evaluated based on their performance in assuring EO program implementation and success. This is consistent with a recommendation made over a decade ago by a Council appointed Task Force established to address EO issues and develop a recommendation regarding the commissioning of a disparity study – a recommendation made by this very commission last year. Good then/Good Today!!

The report notes that discrimination continues to exist and undermine opportunity for people of color and women. It also reports that diversity is good business and aids in meeting the needs of a diverse client or customer base – in this case taxpayer base.

The report discusses “good faith” efforts and the fact that if reviews are conducted with little rigor, prime contractors make only cursory efforts; while subs seeking work waste precious time and resources. The report makes clear the importance of verification of the use of listed subcontractors and the need for holding unethical contractors accountable.

It also includes a cautionary tale about the implementation of Small local business programs because they may lead to the de-emphasis of ethnic and gender components and result in a continuation of the status quo.

The first report to the Council on the SLBE program was more than 30 pages in length and raised these very concerns as it included CDBG program updates, information from the City's Small Business Office and was, in my view, somewhat convoluted.

I hope the Commission will review the report and make some recommendations on future reports that assure the intent of the EO program and prior disparity study findings are not lost or buried.

On a final note, I must mention that I initiated a PRA request re: the Mentor Protégé program and the results were disturbing. One protégé firm had been in business for 20 years, there appeared to be some other irregularities -- and the fact that a sitting member of the Commission is a protégé raises concerns regarding potential *conflicts of interest*.

*Pleased no longer lack of a quorum impeding the important work of this commission.*

Thank you.