



## THE CITY OF SAN DIEGO

DATE ISSUED: **August 26, 2009** REPORT NO. 09-121

ATTENTION: Honorable Mayor, City Council and The Committee on Rules, Open Government and Intergovernmental Relations of the City Council

SUBJECT: Citizens' Equal Opportunity Commission 2009 Spring Quarterly Report

REFERENCE: Municipal Code Chapter II, Article 6, Division 0, Section 26.16; Section 43 of the City Charter-amended 11-4-1969. Amended by Ordinance 19255 on 1/26/04.

## SUMMARY

THIS IS AN INFORMATION ITEM ONLY. NO ACTION IS REQUIRED ON THE PART OF THE CITY COUNCIL.

BACKGROUND

The Citizens' Equal Opportunity Commission (CEOC) was established, pursuant to the authority of Municipal Code section 26.16 enacted on November 12, 1975, as an advisory commission to the Mayor and City Council. The duties of the commission include monitoring and/or evaluating the Equal Opportunity Program of the City; advising on a continuing basis the Mayor, City Council, City Manager, Civil Service Commission and other appropriate agencies of City government; submitting written quarterly reports which evaluate the progress of the City and its agencies for review and acceptance by the Rules, Open Government and Intergovernmental Relations Committee ("the Rules Committee") and, upon acceptance, for submission to the full City Council. Other duties of the commission include assisting the City in recruitment of competent minorities, women and the disabled and promoting the City of San Diego as an Equal Opportunity Employer and as a provider of equal opportunity to individuals and firms desiring to contract with the City. Commissioners are appointed by the Mayor and confirmed by the City Council. They serve two-year terms, without compensation. There are eleven commissioners, four of whom are at-large commissioners, and seven of whom represent the following constituencies: Latino, African-American, Asian/Pacific Islander, Native American, Filipino, Disabled and Lesbian/Gay/Bisexual/Transgender.

The CEOC meets regularly at 6:00 p.m., on the first Wednesday of each month in the 12<sup>th</sup> Floor meeting room of the City Administration Building located at 202 C Street, San Diego. The

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meetings are publicly noticed and open to the public. In addition, beginning in 2004, the CEOC has held a monthly priority setting meeting, also open to the public and publicly noticed, at 8 a.m., on a weekday during the week following the regularly-scheduled Wednesday evening meeting.

## OVERVIEW

The City's programs which have as their stated goals the achievement of equal opportunity can be generally broken down into two components, employment and public contracting. The public contracting aspect of the City's programs involves the City's agreements with non-employed individuals and firms who provide services to the City, for example through consulting, the supply of goods and materials, and the construction of public works. There is, therefore, no single "Equal Opportunity Program" on which the CEOC's attention is focused. Instead, as discussed below, the CEOC has monitored a number of different programs whose stated goals are to afford equal opportunity.

### A. Employment.

As to the City's program to provide equal opportunity as an employer, the CEOC has not been provided sufficiently current data regarding the City's employed workforce to enable it to provide a current and meaningful evaluation. The CEOC has asked City staff to arrange for its receipt of updated data, and a report from the City relative to these matters is scheduled to be presented to the CEOC at its August, 2009 business meeting.

However, based on information provided to the CEOC by City personnel in the not-too-distant past, one matter relative to City employment is worthy of note here. While the City appears to take seriously its obligation to make its facilities accessible to members of the community with physical disabilities, and while the City has incorporated into its Equal Employment Opportunity Policy its commitment to honor the legal requirements of the federal Americans with Disabilities Act and California's Fair Employment and Housing Act of affording "reasonable accommodations" to applicants and employees, the City's policies do not clearly indicate a commitment to ensure equal employment opportunities to the disabled through its hiring practices. The CEOC suggests the policy of ensuring that citizens with disabilities are given an opportunity to participate in the mainstream of American society by engaging in meaningful employment is one that should be adopted by the City more clearly through the hiring of qualified individuals with disabilities who, with reasonable accommodations contemplated by the law, will be a valuable resource to the City as well as their respective communities.

### B. Public Contracting.

The CEOC's role of monitoring the City's programs designed to afford equal opportunity to building contractors who would construct public improvements consumes, as it has historically, most of its attention. Without providing here a long historical account of the City's efforts to afford equal opportunity in public contracting, a current assessment of any progress being made under the City's now-existing programs might fairly begin with Mayor Jerry Sanders' remarks made at the August 1, 2007, meeting of the Rules Committee. On that occasion, the Mayor said

that the City “has done an abysmal job of implementing and maintaining equal opportunity contracting programs”, and he pledged to assume personal responsibility “to implement a program that will serve the needs of every community in San Diego.”

This report will, therefore, focus on the efforts of the City to implement programs which are designed to afford equal opportunities to those who would contract with the City, paying particular attention to any progress which has been made since August, 2007.

## DISCUSSION

### The Importance of Prompt and Regular Reporting

Data which reflects who has submitted bids for, and who have been awarded, public construction contracts is the primary indicator of whether any program designed to achieve equal opportunity is successful.

Undoubtedly, one of the reasons Mayor Sanders admitted the City’s failures relative to equal opportunity contracting programs is that in or about 2004 the City stopped analyzing and reporting on data relating to the City’s construction projects which could have been used to gauge the effectiveness of its Equal Opportunity Contracting Program. Since August 2007, City staff has attempted to reconstruct historical data in order to provide a more recent historical indication of whether the City’s programs were effective. That data provides stark evidence that the City did not, during that time period, achieve diversity in public contracting.

For the CEOC to provide a meaningful evaluation of the effectiveness of the City’s renewed commitment to equal opportunity in public contracting, it must receive regular data regarding what contracts have been awarded, their dollar amounts, who bid on them, and to whom they were awarded (including specifically the number of bids received from, and awards made to, women/minority/disabled veteran-owned firms). The information must be provided to the CEOC well in advance of when City staff intends to periodically report to the City Council or any of its committees, so that the CEOC can provide the evaluations expected of it, when they are expected.

Since August, 2007, the CEOC has requested that City staff report to it regularly regarding this information. Although staff has provided some of the requested information, as of the date of this report, a meaningful system and format through which this critical information is provided to the CEOC with predictable regularity has not been devised.

Yet, from the data which has been provided, racial and gender diversity among the construction contractors engaged by the City has not been attained and little or no progress in that regard has been achieved.

### The Need for a Current Disparity Study

Only two percent of “certified firms” (those owned by women, minorities or disabled veterans) participated in construction contracts awarded by the City under its “race neutral” standards during the July, 2008 through December, 2008 time period.

Representatives of the minority community who have appeared before the CEOC argue that such disappointingly scant participation is a function of the City’s continuing “abysmal” implementation of programs designed to encourage a diverse cross-section of City contractors, such as its SCOPE program. On the other hand, representatives of the San Diego Chapter of the Association of General Contractors argue that women, minority or disabled-veteran owned construction firms are not participating in public construction because an insufficient number, if any, of such firms submit bids to be awarded such work. They suggest such firms may not even exist. They call for “an availability study” to be conducted.

It has been over 15 years since the City last commissioned a disparity study to analyze the extent to which minority and/or women owned business enterprises (MBE/WBE) were afforded equal contracting opportunities in the San Diego construction industry and by the City. The conclusion of that report was that discrimination did, in fact, exist in the San Diego construction industry, and that the City was at least a passive participant in that discrimination.

As the San Diego City Attorney’s Memorandum (MS59) of March 28, 2008, concluded, “governmental agencies have an affirmative obligation to remedy the ongoing effects of intentional discrimination within their jurisdictions.” With this obligation in mind, the CEOC recommends the City’s commission of a current disparity study to ascertain whether non-participation in City contracting by firms owned by women and people of color is, today, a function of industry-wide discrimination and whether the City may be fairly criticized as being a passive participant in any such discrimination. The results of such a study will give the City the information it sorely needs to attempt to determine the reasons for such scant participation in government contracting by such firms and to fashion more effective programs to remedy any discriminatory conduct reported.

Depending on the California Supreme Court’s determination of the issues now pending before it in the *Coral Construction, Inc. v. City and County of San Francisco* case, the results of such a disparity study will also reveal whether the City should or must implement race-conscious participation goals in public works contracts.

### The Subcontracting Outreach Program (SCOPE)

The City’s SCOPE program, applicable to City construction projects in excess of \$100,000 is intended to achieve a diverse cross-section of subcontractors by encouraging prime contractors to conduct race/gender neutral outreach efforts. It sets mandatory subcontractor participation goals, and advisory participation levels for Disadvantaged Business Enterprises (“DBE’s”) and Disabled Veteran Business Enterprises (“DVBE’s”).

The SCOPe Program has been in effect since 2001. Whether a function of poor City implementation or faulty design, the program has not produced a diverse cross-section of subcontractor participants. In an effort to improve its effectiveness, the City has recently revised its SCOPe program by adopting the recommendations of consultant Franklin Lee.

The revised SCOPe program has not, yet, been fully implemented. The delay appears to be attributable to staff limitations combined with the City's need to acquire and implement computer software necessary to the outreach efforts contemplated by the revised SCOPe Program. Without the software, prime contractors remain obligated to conduct and report on its outreach efforts as they did before the recent changes.

The bottom line, however, is that since the Mayor's 2007 pledge to implement and maintain the City's programs, the SCOPe Program has not, yet, been effective in increasing DBE and/or DVBE participation in City construction contracts.

#### The Minor Construction Program ("MCP")

The MCP, enacted in 2002, permits "minor public works", i.e., construction contracts valued at \$250,000 and under, to be bid out to small and emerging businesses who are participants of the program. In 2008, the dollar value of contracts let by the City to MCP participants was quite low. In 2009, twenty-two (22) MCP contracts have been identified.

The CEOC recommends City attention to methods by which a greater dollar volume of City work is completed by MCP participants, such as through the unbundling of larger contracts so that some of their components can be eligible for completion by MCP participants.

#### The Mentor Protégé Program

Construction: The total number of graduates of this program are five (5). The CEOC will ask City staff to provide a report to it on the number of City contracts for which graduates of the program have submitted bids, the number of City contracts awarded to any of such graduates, the number of such contracts completed and the total dollar value of such contracts. The CEOC will include an assessment of the effectiveness of the program in a future report. The CEOC commends all mentors who have participated in this program.

Consulting: The CEOC is pleased to note the City's participation in the Architectural and Engineering Mentor Protégé Program, and will report on the effectiveness of that program in a future report.

#### Community Development Block Grant Analysis

The City allocates a portion of Community Development Block Grant (CDBG) funds to various organizations, consistent with the goals of that program to assist low and moderate income persons. The CEOC has asked for, and will receive, a presentation on the City's allocation of CDBG funds at its July, 2009, meeting. The CEOC is interested in assessing the extent to which such grants have been, or might be, effective in increasing diversity in public contracting.

### The Contractor/Vendor Registration System

The creation and maintenance of a contractor/vendor computer database by which those who would contract with the City can identify themselves by such registration, and by which they can indicate whether they are certified M/WBE or DVBE firms and additional valuable information about them is an important feature of the outreach efforts designed to achieve a diverse cross-section of building contractors, suppliers and consultants engaged by the City. By design, this database will be made accessible to prime contractors obliged to complete the subcontractor outreach obligations of the SCOPE program, and the computer software associated with the database will enable prime contractors to complete their outreach efforts through the City's program.

As noted above, the City's acquisition and implementation of off-the-shelf computer software needed to make this component of the City's SCOPE Program fully operational, has been delayed. The CEOC understands it should be fully operational by September, 2009, and looks forward to evaluating its effectiveness in the future.

### Outreach Activities

To achieve diversity in public contracting which has been lacking historically, the City must continue and improve upon its efforts to advise all contractors, including DBE/SWBE/SMBE and DVBE firms, of the availability, type and dollar amounts of City contracts.

Presently, construction projects which are completed with City funds are subject to the race neutral outreach limitations imposed by Proposition 209, passed by California voters in 1996. However, certain contracts awarded by the City are for the expenditure of federal funds, and those contracts include federally-mandated race and gender conscious participation goals. Therefore, City employees who staff the Equal Opportunity Contracting Department must be trained in the current requirements of contracts awarded pursuant to any such program. The City should also, as a part of its outreach efforts, urge all firms eligible to be certified as DBE/SWBE/SMBE and/or DVBE firms to obtain such certifications in light of the opportunities available to them when contracts subject to federal program requirements are awarded.

### Proposed Small or Local Business Preference Program

The City has also recently obtained the recommendation of consultant Franklin Lee that it adopt a local small business preference program, applicable to construction contracts as well as those for goods, services and consulting.

The CEOC has been reviewing this proposed program, and believes that a program which requires the City to contract with local small businesses for a significant part of its needs would be beneficial. Local small business owners are a valuable feature of the local economy. Money spent on such contracts would be used to pay wages to local employees and generate profits for local business owner, which would have the effect of stimulating local business and local tax

revenue. The provision of subcontracting opportunities to small local businesses may also result in the achievement of greater diversity on a race neutral basis.

The CEOC's review of this proposed program is not, yet, complete. It has been asked to, and will later provide more specific feedback regarding the proposed program and its features.

### Compliance-Related Activities

For equal opportunity activities to be effective, parties on both sides of any affected contract, i.e., both City staff and contractors, need to devote the resources to compliance with the applicable program requirements. The City has been providing, and continues to provide, opportunities for contractors to be trained on how to comply with equal opportunity programs. The CEOC also recommends that City staff be trained regarding the preparation of certified payroll forms, because many of the construction contracts to be let by the City in the foreseeable future will involve the expenditure of federal stimulus funds, subject to federal participation requirements.

### Structure and Staffing

Whether it is a function of the City's Budget Process Re-engineering process begun in 2006 or whether the problem is one which existed before then, the City's renewed commitment to the achievement of equal opportunity in all aspects of public contracting, including consulting, purchasing and construction contracts, is a commitment which must be included in the workings of all affected City departments. It has appeared to the CEOC that the implementation and supervision of the City's equal opportunity programs and policies is fractured among different departments, with uncertain lines of supervision, authority and reporting. This structural deficiency also makes it more difficult for relevant information to be assembled and supplied to the CEOC.

The CEOC recommends that the City re-assess the structure of its affected departments with a specific goal of improving the effectiveness of the City's equal opportunity programs.

As it has also become apparent, especially over the last two or three years, it is critical to the effectiveness of the City's equal opportunity programs for the Equal Opportunity Contracting Department to be fully staffed with competent, dedicated personnel. The City's past neglect of the staffing requirements of its Equal Opportunity Contracting office was inexcusable.

The CEOC is, therefore, pleased that the City has exhibited its renewed attention to these important issues by hiring and maintaining a sufficient number of employees to implement and maintain its equal opportunity contracting programs. The City must remain diligent with respect to the employment of a sufficient number of properly trained personnel in connection with its effort to achieve equal opportunity.

CONCLUSION

The CEOC will continue to monitor and report on the efforts and policies of the City related to equal opportunity in contracting. While the City appears to be moving toward the full implementation of its programs designed to afford equal opportunity, it has not, yet, effectively done so. The challenges are significant and important, and the City should not falter in its resolve to achieve appropriate diversity among those with whom it contracts.

The CEOC will continue to address issues relating to equal opportunity in employment, as well.

Respectfully submitted,

  
Ms. Rebecca Llewellyn, Chair  
Citizens' Equal Opportunity Commission

  
Dr. Shirley Weber, Vice-Chair  
Citizens' Equal Opportunity Commission