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REPORT TO THE BUDGET AND GOVERNMENT EFFICIENCY COMMITTEE

RECENT CASE LAW AND THE CITY'S USE OF OTHER AGENCIES' DISPARITY STUDIES

## INTRODUCTION

At the November 19, 2015, Budget and Government Efficiency Committee, the Equal OpportunityProgram(EOCP) presented its Fiscal Year 2015 Business Diversity Annual Report detailing the City's utilization of Small and Local Business Enterprises (SLBEs) and Emerging Local Business Enterprises (ELBEs) in the award of City contracts. Report to Council No. 15-098 (Nov. 2, 2015). Councilmembers Cole and Alvarez inquired if the City of San Diego (City) may utilize the results of the 2014 California Department of Transportation (CALTRANS) or 2014 San Diego Association of Governments (SANDAG) disparitystudies to address potential disparities in the City's award of contracts to Minority or Women Owned Business Enterprises (MBEs or WBEs).

## QUESTION PRESENTED

May the City utilize the results of the CALTRANS or SANDAG disparitystudies to implement a race[1] or gender-conscious alternative to the City's SLBE/ELBE preference program?[2]

## SHORT ANSWER

No. The City may not use the results of the CALTRANS or SANDAG disparity studies to implement a race or gender-conscious preference program. Race or gender-conscious programs must be based on particularized findings of discrimination in the specific location and industries targeted by the program.

## ANALYSIS

This Office previously analyzed the legalityof utilizing the 2007 CALTRANS disparity study to implement a race or gender-conscious preference program in lieu of the City's SLBE/ELBE preference program. 2009 City Att'y Report 601 (2009-26; Oct. 22, 2009). We recommended that the City first commission a disparitystudy specific to the San Diego

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[1] Throughout this Report the word "race" will be used to refer to race, color, ethnicity, and/or national origin.

[2] The SLBE/ELBE preference program for public works construction contracts is codified in Chapter 2, Article 2, Division 36 of the Municipal Code. The SLBE/ELBE preference program for goods, services, and consultant contracts is set forth in Council Policy 100-10.

marketplace to assess whether and to what extent such discrimination exists. *Id*. at 10. We also advised that California courts had not resolved whether disparity study results would support a race or gender-conscious program in light of Proposition 209. Proposition 209, codified in California Constitution, prohibits preferences based on race or gender in public employment, public education, or public contracting. Cal. Const. art. I, § 31 (Prop. 209). Specifically, the California Constitution states, "[t]he 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."[3]

On August 2, 2010, the California Supreme Court issued its final decision regarding the constitutionality of a 2003 San Francisco ordinance (Ordinance) granting bid discounts based on the level of MBE or WBE participation. *Coral Construction, Inc., v. City and County of San Francisco*, 50 Cal. 4th 315 (2010). San Francisco argued that despite Prop. 209, the federal equal protection clause[4] compelled San Francisco to provide bid preferences for MBEs and WBEs to remedy its own past discrimination. *Id*. at 335. The Supreme Court held that the federal equal protection clause did not compel San Francisco to enact the Ordinance unless the City could prove: (1) it purposefully or intentionally discriminated against MBEs and WBEs; (2) the purpose of the Ordinance is to provide a remedy for such discrimination; (3) the Ordinance 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 past discrimination. *Id*. at 337-38. Lacking evidence in the record, the Court remanded the issue to a lower court for San Francisco to present evidence supporting the City's decision to enact the Ordinance. *Id*. at 335-37. In a footnote, the Court seemingly cautioned San Francisco on their ability to prevail. It noted that the City "appear[ed] to concede" that it had not been the City's policy to discriminate against MBEs and WBEs for almost 30 years, that the City could not identify a single a prime contractor who discriminated against a MBE or WBE subcontractor since 1996, and that the City did not identify discrimination in any specific contract awarding authority in awarding a City contract since 1996. *Id*. at 336 n.18.

Unfortunately, *Coral* offers little guidance on the sufficiency of evidence required to create a legally defensible race or gender-conscious preference program. Rather than presenting the evidence required by the Supreme Court to determine the extent and severity of discrimination in its public contracting, San Francisco repealed its Ordinance. In its place, San Francisco enacted their equivalent of San Diego's SLBE/ELBE preference program. San Francisco Administrative Code Chapter 14B.

It is clear, however, that the City cannot use the 2014 CALTRANS or SANDAG disparity studies to determine its own potential disparities. Federal law requires that a race or gender-conscious preference program survive "strict scrutiny" review, meaning that the program is: (1) necessary to serve a compelling state interest; and (2) narrowly tailored to address that interest. *City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 496-97, 507 (1989). As such,

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[3] Last year, the Supreme Court upheld the constitutionality of a Michigan Constitutional amendment nearly identical to Prop. 209. *Schuette v. BAMN*, 134 S. Ct. 163 (2014).

[4] The federal equal protection clause prohibits states from denying any person within its jurisdiction equal protections of the law. In other words, the laws of the state must treat an individual in the same manner as others in similar conditions and circumstances.

a program may not be based on generalized findings of discrimination in the national or statewide marketplace. *See, e.g., Fullilove v. Klitznick*, 448 U.S. 448, 504-05 (1980). Rather, race or gender-conscious programs must be based on particularized findings of discrimination in the specific location and industries that the program targets. *Id.*[5]

The CALTRANS and SANDAG disparitystudies are not specific to San Diego's marketplace and therefore do not meet the specificity requirements of *Fullilove*. The CALTRANS study, issued in December 2014, examines contracts awarded throughout the state. CALTRANS District 11 includes all of San Diego and Imperial County, not analysis specific to San Diego's marketplace. The SANDAG study, issued in May 2014, provides a regional analysis focused on San Diego, Imperial, and Orange Counties. Since these studies offer a statewide or regional analysis with limited data specific to San Diego and its industries, a court is not likely to find the data sufficiently particularized to support a race or gender-conscious preference program.

**CONCLUSION**

If the City wishes to adopt a race or gender-conscious preference programto remedy any perceived discrimination in the City, we recommend that the City first commission a disparity study specific to the San Diego marketplace to assess whether and to what extent such discrimination exists. The City may not use the results of the 2014 CALTRANS or SANDAG disparity studies. Once completed, the City must meet the *Coral* requirements in providing sufficient evidence that the City's intentional discrimination of MBEs or WBEs is sufficiently severe that its race or gender neutral program, such as the SLBE/ELBE preference program is not sufficient to rectify the problem.

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By */s/Lara E. Easton*
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cc: Marshall Anderson, Policy Advisor, Office of the Mayor
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[5] For a complete discussion of the *Croson* and *Fullilove* decisions, *see* 2007 City Att'y MOL 114 (2007-13; Sept. 10, 2007).