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REPORT TO THE PUBLIC SAFETY AND NEIGHBORHOOD SERVICES COMMITTEE

FOLLOW-UP TO RECOMMENDATIONS FOR SUBCONTRACTING OUTREACH
PROGRAM

INTRODUCTION

On February 25, 2008, the Mayor's Office, in conjunction with the Purchasing and Contracting Department and Equal Opportunity Contracting Program [EOCP], presented a status report to City Council regarding actions taken or currently underway to address the City's failure to achieve diversity in City contracting. See Mayor's Report to Council, No. 08-020 (February 20, 2008) [RTC 08-020]. The status report included consultant Franklin Lee's general recommendations for strengthening the Subcontracting Outreach Program [SCOPE]. You requested that our office provide a legal review of these recommendations, which we set forth in our Memorandum dated March 28, 2008, attached hereto as **Exhibit A**.

Subsequent to our March 28, 2008 memorandum, Mr. Lee incorporated his recommendations, as well as input from the City Attorney, the Citizen's Equal Opportunity Commission [CEOC], and key stakeholders in the construction industry, into a strike-out version of the SCOPE Program Summary, attached hereto a **Exhibit B** [SCOPE Program Summary]. You requested that our office: (1) provide a legal review the specific revisions to the SCOPE Program Summary set forth in Exhibit B, and (2) generally address the legality of a small and/or local business preference program as a possible alternative to SCOPE. We have included our analysis on both points below.

QUESTIONS PRESENTED

1. Are consultant Franklin Lee's specific revisions to the SCOPE Program Summary legally permissible?
2. Would a small and/or local business preference program be legally permissible as a possible alternative to SCOPE?

BRIEF ANSWERS

1. Yes, Mr. Lee's specific revisions to the SCOPE Program Summary recommendations are legally permissible, and may even help reduce the City's liability against discrimination claims in City contracting.
2. Yes, a small and/or local business preference program is legally permissible, and may have some advantages as a possible alternative to SCOPE.

DISCUSSION

I. Specific Revisions to SCOPE Program Summary.

As discussed in our March 28 memorandum, the SCOPE program currently applies to City construction projects in excess of \$250,000, and is intended to encourage prime contractors to increase outreach efforts to a diverse cross-section of subcontractors. SCOPE sets mandatory subcontractor participation goals, as well as advisory participation levels for Disadvantaged Business Enterprises [DBEs]¹ and Disabled Veteran Business Enterprises [DVBES]. SCOPE awards points to bidders for documentation of various race/gender-neutral outreach efforts. While outreach efforts are mandatory, failure to reach advisory participation levels will not render a bid non-responsive. Successful contractors are also required to submit a Final Summary Report within 15 days of completion of a contract, which should include information regarding actual subcontractor activity. SCOPE Program Summary, § X, p. 13.

In our Memorandum of Law No. 13, dated September 10, 2007 [MOL-07-013], the City Attorney made several recommendations for bolstering SCOPE, such as including advisory participation levels for Minority Business Enterprises [MBEs] and Woman Business Enterprises [WBEs], and enhancing enforcement measures. MOL-07-013, p. 27. Mr. Lee's general recommendations echoed these suggestions, and provided a myriad of other proposals for improving SCOPE, such as (to summarize):

- Formalizing waiver procedures;
- Requiring submission of outreach documentation by all bidders at the time of bid;
- Bolstering penalties for false reporting of outreach efforts/subcontractor utilization, or failure to submit Final Summary Reports;
- Requiring prime contractors to advertise opportunities on the City's website;
- Reducing the dollar threshold for eligible projects from \$250,000 to \$200,000;
- Requiring periodic audits of SCOPE's effectiveness; and

¹ DBEs are defined as any "certified business which is at least fifty-one percent (51%) owned and operated by one or more socially and economically disadvantaged individuals and whose management and daily operation is controlled by qualifying part(ies)..." SCOPE Program Summary, § III, p. 3.

- Implementing an on-line Vendor/Bidder Registration System to facilitate access to available subcontractors.

In our March 28 memorandum, we concluded that not only were Mr. Lee's general recommendations legally permissible, but that they could possibly reduce the City's liability against discrimination claims in City contracting. *See, e.g., Coral Construction, Inc. v. City and County of San Francisco*, 149 Cal. App. 4th 1218, 1248 (2007), *review granted* August 22, 2007, S152934 (finding that the state actors have an affirmative duty to eliminate the continuing effects of past unconstitutional discrimination).² Thus, we advised the City to adopt Mr. Lee's recommendations with a few modifications, including: (1) lowering the dollar threshold for SCOPe eligibility from \$250,000 to \$100,000, which was the original threshold when the program was implemented³ and is consistent with the more aggressive program utilized by the City of Los Angeles, (2) clarifying procedures for calculating advisory participation levels, and (3) increasing EOCP staffing levels to ensure consistent monitoring and enforcement of the program. See Exhibit A, pp. 3-4.

The specific revisions to the SCOPe Program Summary set forth in Exhibit B implement the general recommendations outlined above, modified slightly to include input from the City Attorney, the CEOC, and the construction industry; as such, the specific revisions are legally permissible and may even strengthen the City's position against claims alleging discrimination in City contracting.

II. Small and/or Local Business Preference Programs.

In addition, or possibly as an alternative, to strengthening SCOPe, the City may consider implementing a small and/or local business preference program. As a preliminary matter, neither federal equal protection principles nor state law prohibits granting preferences to small or local business, provided that such preferences are not race or gender-conscious.

Courts have interpreted the federal Equal Protection Clause, which provides that "[n]o State shall... deny any person within its jurisdiction the equal protection of the laws" (U.S. Const., Amend. XIV), as requiring that race and gender-based programs be subject to heightened scrutiny. *See, e.g., City of Richmond v. A. J. Croson Construction Company*, 488 U.S. 469, 496-97, 507 (1989)(race-conscious programs are subject to a strict scrutiny analysis, which requires that the government body administering the program demonstrate that the program is: (1) necessary to serve a compelling state interest, and (2) narrowly tailored to address that interest). Article I, Section 31 of the California Constitution, enacted by the voters in 1996 as Proposition 209, places even more stringent restrictions on race or gender-based programs than the federal strict scrutiny test. Proposition 209 states: "The state shall not discriminate against, or grant

² For a complete discussion of the *Coral Construction* case, see MOL-07-013, pp. 9-11 and 21-27.

³ On July 29, 2002, City Council raised the dollar threshold for SCOPe from \$100,000 to \$250,000 in Resolution No. R-296880.

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.”⁴

Neither the federal nor state constitution, however, prohibits race or gender-*neutral* programs, such as small and/or local business programs designed to assist emerging business in competing for public contracts. Indeed, some version of a small and/or local business preference program is currently being utilized by the federal government, the State of California, the City of San Francisco, the City of Oakland, and other government agencies. While not specifically targeted toward addressing race and gender discrimination, small and/or local business programs have the advantage that government agencies can impose mandatory rather than advisory participation levels for small and/or local businesses.

If and when the City wishes to consider a small and/or local business preference program, the City Attorney can provide a legal review of the program specifics, as well as a general update on the state of the law regarding these types of programs.

CONCLUSION

In conclusion, the specific revisions to the SCOPe Program Summary set forth in Exhibit B are legally permissible and may strengthen the City’s position against claims alleging discrimination in City contracting. In addition, a small and/or local business program is a legally permissible, and potentially advantageous, alternative to SCOPe.

Respectfully submitted,

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City Attorney

SRS:js
RC-2008-16

Cc: Debra Fischle-Faulk, Director of Administration
Beryl Rayford, EOC Program Director
Citizens Equal Opportunity Commission

⁴ As the Third District Court of Appeal explained in *C & C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284, 293 (2004): “Section 31 is similar to, but not synonymous with, the equal protection clause of the federal Constitution. Under equal protection principles, state actions that rely on suspect classifications must be tested under strict scrutiny to determine whether there is a compelling state interest. Section 31 allows no compelling state interest exception.”