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September 14, 2009

REPORT TO THE COMMITTEE ON RULES, OPEN GOVERNMENT AND
INTERGOVERNMENTAL RELATIONS

EQUAL OPPORTUNITY CONTRACTING: EXISTING LEGAL OPTIONS

INTRODUCTION

At the September 2, 2009 hearing of the City Council's Rules, Open Government and Intergovernmental Relations Committee [Committee], the Equal Opportunity Contracting [EOC] Department presented a report on the City's various EOC programs and contract statistics for Fiscal Year 2009. In its report, the EOC Department stated that it will bring a comprehensive small and local business preference program to the Committee for consideration in October or November 2009.

At the hearing, Councilmember Donna Frye requested that the City Attorney report on the City's existing legal methods to enhance diversity in City contracting while the City considers implementing a small or local business preference program. As requested, we have summarized the City's legal options under current law, policies, and programs. We defer to City staff regarding the extent to which these options are currently being implemented and whether additional steps may be appropriate.

DISCUSSION

The City has a number of legal methods to enhance diversity in City contracting that do not require a change to the Municipal Code or other Council action. The options currently available to the City vary depending on the contract type, as follows:

I. Goods and Services: Council Policy 100-10.

The City can continue to apply Council Policy 100-10. Council Policy 100-10, attached as **Exhibit A**, permits the Purchasing Agent to apply a local vendor preference to goods and services contracts. Specifically, it provides for a discretionary bid discount for local vendors in an amount equal to the amount of sales tax returned to the City. The policy states that:

The City shall purchase materials, supplies and services from businesses within the City of San Diego *when it is legal and economical to do so*. All or any portion of the City Sales Tax returned to the City shall be considered in the evaluation of bids. In

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the event of tie bids San Diego vendors will be given preference.
(Emphasis added.)

According to the Purchasing and Contracting Department, this Council Policy is regularly applied to goods and services contracts. If Council wishes to enhance Council Policy 100-10, it may do so by increasing the amount of the bid discount and making the discount mandatory rather than discretionary. When the EOC Department presents its comprehensive small and local business preference program to the Committee this fall, our Office will present corresponding revisions to Council Policy 100-10 for Council's consideration.

II. Consultants: Include Commitment to Diversity as Evaluation Criteria in RFPs.

In selecting consultants, the City can evaluate a proposer's commitment to diversity. Although the City cannot consider race or gender in the selection of public contracts,¹ it can consider a contractor's overall commitment to diversity, particularly when selecting a contractor on a basis other than lowest price.

As discussed in our Report to the Rules Committee dated May 20, 2009, entitled "Legal Options for Small or Local Business Preference Programs" [RC-2009-9], consultant contracts are not subject to the Charter section 94 requirement to award to the "lowest responsible and reliable bidder." RC-2009-9, p.9. Consultants are typically selected via a Request for Proposal [RFP], which includes a number of different selection criteria. Under standardized criteria, an RFP can require proposers to address their commitment to diversity. For example, it can request that proposers describe their diversity policies, outreach and recruitment efforts, and other programs.

III. Construction: Package Contracts to Maximize Existing Programs.

Finally, the City can package construction projects to maximize existing programs like the Minor Construction Program, codified at San Diego Municipal Code sections 22.3601 *et seq.* Under Charter section 94, only contracts that "exceed the sum established by ordinance of the City Council" must be awarded to the lowest responsible and reliable bidder. The Minor Construction Program permits "minor public works," i.e., construction contracts valued at \$250,000 and under, to be bid out to a closed universe of small and emerging businesses that participate in the program.

¹ Proposition 209 states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a). For a complete discussion on the prohibition of race or gender-based preferences in City contracting, see our Memorandum of Law dated September 10, 2007, entitled "Overview of Law Concerning Equal Opportunity in Contracting: Existing Programs and Recommendations" [ML-2007-13].

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Where feasible and appropriate, the City can divide large construction projects into smaller projects in order to maximize the number of projects eligible for the Minor Construction Program. Again, we defer to City staff as to how best to implement this option.

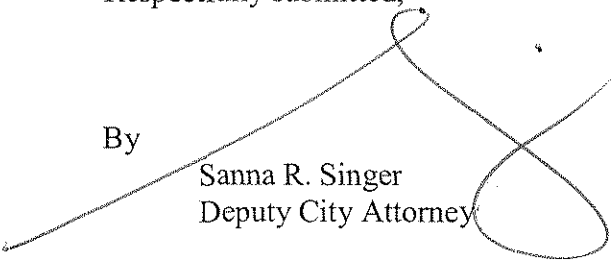
CONCLUSION

The City has a number of legal methods to ensure diversity in City contracting that do not require a change to the Municipal Code or other Council action. For example, the City can: (1) continue to apply the existing local preference policy for goods and services contracts; (2) include specifications regarding commitment to diversity in RFPs for consultants; and (3) as appropriate, package construction projects in order to maximize existing programs like the Minor Construction Program.

Respectfully submitted,

By

Sanna R. Singer
Deputy City Attorney



SRS:amt
Attachment
RC-2009-22

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY**CURRENT**

SUBJECT: LOCAL VENDOR PREFERENCE
POLICY NO.: 100-10
EFFECTIVE DATE: May 29, 1984

BACKGROUND:

The City of San Diego expends millions of dollars annually in the procurement of materials, supplies and services to meet the requirements of the various City departments. Historically a little more than half these purchases have been made from suppliers outside the City of San Diego.

PURPOSE:

The purpose of this policy is to express the intentions of the City Council with regard to local vendor preference.

POLICY:

The City Council recognizes the importance of a sound local economy to the overall vitality of the community. Businesses located in the City of San Diego are capable of providing many of the goods and services for which the City contracts.

The City shall purchase materials, supplies and services from businesses within the City of San Diego when it is legal and economical to do so. All or any portion of the City Sales Tax returned to the City shall be considered in the evaluation of bids. In the event of tie bids San Diego vendors will be given preference.

HISTORY:

Adopted by Resolution R-260805 05/29/1984