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October 22, 2009

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

**SMALL AND LOCAL BUSINESS PREFERENCE PROGRAM: DRAFT ORDINANCE,
REVISIONS TO COUNCIL POLICY 100-10, AND RELATED LEGAL ISSUES**

INTRODUCTION

At the May 27, 2009 hearing of the City Council's Rules, Open Government and Intergovernmental Relations Committee [Committee], the City Attorney presented a report on the City's legal options for implementing a small or local business preference program for City contracts. The Committee requested that the Equal Opportunity Contracting [EOC] Department and City Attorney return to the Committee with a proposed program and draft ordinance, which were to include some of the legal options presented.

Specifically, the Committee requested that the program include a small and local business bid preference for construction contracts up to \$1 million and mandatory subcontractor participation requirements for all construction contracts. At its September 2, 2009 hearing, the Committee also requested that EOC and the City Attorney bring forward proposed revisions to Council Policy 100-10, which would extend a small and local business preference to goods, services, and consultant contracts.

We have included below an overview of the draft Small and Local Business Ordinance and proposed Council Policy 100-10, which include the Committee's recommendations. In addition, we have provided legal analysis on related inquiries by the Committee, including: (1) whether and to what extent the City may include a local workforce component in the proposed program; (2) whether and to what extent the City can adjust bonding and insurance requirements on City contracts; and (3) whether and to what extent the City can utilize the results of the California Department of Transportation's [CALTRANS] disparity study for implementing an alternative, race and gender-conscious contracting program.

QUESTIONS PRESENTED

1. Are the proposed Small and Local Business Ordinance and revisions to Council Policy 100-10 legally permissible?
2. May the City include a local workforce requirement in the proposed program?

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3. May the City adjust bonding and insurance requirements for City contracts?
4. May the City utilize the results of the CALTRANS disparity study to implement a race and gender-conscious alternative to the proposed small and local business program?

BRIEF ANSWERS

1. Yes. The proposed Small and Local Business Ordinance and revisions to Council Policy 100-10 provide preferences for small and local businesses that are permissible under the City Charter, and both state and federal law.
2. Probably not. A local workforce requirement is legally problematic under the federal Privileges and Immunities Clause. However, if the City Council wishes to pursue this option, the City would first need to establish a factual basis for concluding that non-resident workers constitute a particular “source of evil” to be remedied.
3. Yes. The City may adjust its existing performance bond requirements and its standard insurance requirements for City contracts. However, we strongly recommend that staff carefully evaluate the risk of non-performance, the cost of substituting a new contract if necessary, and also consult with Risk Management before making any such adjustment. The City may not adjust existing bid bond requirements without Council action or payment bond requirements for construction contracts.
4. No. The City may not use the results of the CALTRANS disparity study to implement a race and gender-conscious program. The legality of such a program is currently under review by the California Supreme Court. Even if the Court upholds this type of program, the City would need to conduct a disparity study that is specific to the City of San Diego.

DISCUSSION

The City has a number of legal options for implementing a small or local business preference program. The options vary depending on the nature of the contract at issue. Accordingly, the draft ordinance and Council Policy revisions discussed below include different preference mechanisms for construction, goods and services, and consultant contracts.

I. Small and Local Business Ordinance: Construction Contracts

Per the Committee’s request, we have drafted a Small and Local Business Ordinance for construction contracts, attached hereto as **Exhibit A**. The ordinance would amend San Diego Municipal Code [SDMC] sections 22.3601 through 22.3616, which currently set forth the components of the Minor Construction Program [MPC]. Established in 2002, the MPC requires “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 who are participants of the program. SDMC §§ 22.3610(a), 22.3611(a). The proposed changes would increase the cap for minor public works to \$500,000, add a small and local business bid preference for major public works projects under

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\$1,000,000, and impose mandatory subcontractor participation requirements for small and local businesses on all public works contracts.¹

A. Sheltered Competition and Bid Preferences

The proposed Small and Local Business Ordinance would raise the caps for minor public works to \$500,000 and create a two-tiered sheltered competition program: (1) contracts valued at \$250,000 to \$500,000 would be bid out to a closed universe of Small Local Business Enterprises [SLBEs] and Emerging Local Business Enterprises [ELBEs],² and (2) contracts valued under \$250,000 would be bid out to a closed universe of ELBEs.

In addition, the ordinance would establish bid preferences for SLBEs and ELBEs bidding on major public works contracts over \$500,000 but under \$1 million. Contracts in this category would be subject to a bid preference in the way of: (1) 5 percent discount off the bid price for SLBEs and ELBEs bidding as prime contractors, and (2) a discount off the bid price equal to the percentage of SLBE or ELBE subcontractor participation not to exceed 5 percent of the total bid 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], these proposals are legally permissible. The City Charter requires the award of a construction contract to the “lowest responsible and reliable bidder” only if the contract exceeds a sum established by the Council by ordinance. San Diego Charter § 94; *see also* RC-2009-9, pp. 3-6. Therefore, Council has authority to set caps under which sheltered competition procedures or bid preferences³ may be used.

¹ It is important to note that the proposed ordinance would only affect construction contracts funded by the City. State and federally-funded contracts may be subject to alternative programs and subcontracting requirements, depending on the funding agency.

² The proposed ordinance defines SLBE as a Small Business Enterprise (based on certain dollar thresholds to be set by the City Manager) that is also a Local Business Enterprise. An ELBE is an Emerging Business Enterprise (based on certain dollar thresholds to be set by the City Manager, which are approximately half of those for a Small Business Enterprise) that is also a Local Business Enterprise. A Local Business Enterprise is a business that has a principle place of business and substantial employee presence in the City or County of San Diego, and which has been in operation for twelve consecutive months. Proposed SDMC § 22.3603.

³ Preferences based on business size or locality are subject to a constitutional “rational basis” review and are generally permissible. *See Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 944-45 (9th Cir. 1987), *overruled in part on separate grounds by Associated General Contractors of California, Inc. v. Coalition for Economic Equality*, 950 F. 2d 1401, 1414 (1991) (finding that a local business preference did not violate the federal Equal Protection Clause; San Francisco had articulated legitimate reasons for the preference - i.e., to offset the cost of doing business in the city and to stimulate the local economy); RC-2009-9, pp.4-5. *See, also, Big Country Foods, Inc. v. Board of Education of the Anchorage School District*, 952 F.2d 1173, 1177-78 (9th Cir. 1992) (upholding 7 percent preference for in-state milk producers against dormant commerce clause challenge). However, preferences may not be based on race or gender. The California Constitution states: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of

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B. Mandatory Subcontractor Participation

The proposed Small and Local Business Ordinance also would impose a mandatory subcontracting requirement for SLBEs and ELBEs on all major and minor public works contracts. Contractors would either have to reach the mandatory subcontractor requirements, or demonstrate good faith efforts to do so, in order to be responsive to a request for bid.

Mandatory subcontractor participation requirements are legally permissible provided that they further a legitimate government interest and are not “arbitrary, capricious, or lacking in evidentiary support.” *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission*, 21 Cal. 4th 352, 361 (1999); *see also M&B Construction v. Yuba County Water Authority*, 68 Cal. App. 4th 1353, 1361 (1999); *see also RC-2009-9*, pp. 7-9.

It is important to note that we are not aware of a case specifically holding that mandatory subcontractor requirements for small and local businesses are permissible bid requirements. However, the case law generally affords government agencies discretion in crafting bid specifications. *See, e.g., Associated Builders and Contractors*, 21 Cal. 4th at 366-369. In addition, other jurisdictions have been successful in imposing such requirements,⁴ and we have not found legal authority specifically prohibiting this approach.

In order to best insulate subcontractor requirements from legal challenge, we recommend that the City Council state why a preference for small and local business would further legitimate governmental interests, for example, promoting diversity, growing small businesses, and stimulating the local economy. We have incorporated draft declarations, for Council’s consideration, in the draft Small and Local Business Ordinance (Exhibit A).

II. Council Policy 100-10: Goods, Services, and Consultant Contracts

We also attached, as **Exhibit B**, proposed revisions to existing Council Policy 100-10. Council Policy 100-10 currently 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

race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Cal. Const. art. I, § 31(a).

⁴ For example, the City of San Francisco currently imposes a local business subcontractor participation requirement for all public works contracts regardless of dollar amount. The City of Oakland imposes a small and local business subcontractor participation requirement for all construction contracts over \$100,000.

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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. (emphasis added).

At its September 2, 2009 hearing, the Committee requested revisions to Council Policy 100-10 that would: (1) increase the bid discount for goods and services contracts; and (2) make imposition of the bid discount mandatory rather than discretionary. We have drafted revisions, which provide for a 2 percent bid discount for SLBEs and ELBEs bidding or proposing as primes and a voluntary subcontractor requirement of 20% for SLBEs and ELBEs. We have also extended the Council Policy to encompass consultant contracts. Finally, in response to Committee input, we have included provisions requiring that Requests for Bid [RFBs] and Requests for Proposals [RFPs] include the bidder's or proposer's commitment to diversity as an evaluation criterion.

As discussed in our May 2009 report and follow-up Report to the Rules Committee of September 14, 2009, entitled "Equal Opportunity Contracting: Existing Legal Options" [RC-2009-22], the Charter section 94 requirement to award to the "lowest responsible and reliable bidder" extends only to public works projects over a dollar amount determined by ordinance. Therefore, the City may impose a bid preference for small and local vendors or consultants without a Charter or Municipal Code change.

In addition, the City can impose a mandatory SLBE and ELBE subcontractor requirement provided that the subcontractor requirement furthers a legitimate governmental interest and is not arbitrary or capricious. *M&B Construction*, 68 Cal. App. 4th at 1361. We included draft declarations regarding the purpose of a small and local business preference for goods, services, and consultant contracts for Council's consideration in the proposed revisions to Council Policy 100-10 (Exhibit B).

III. Local Workforce Requirements

At the Committee's September 16, 2009 hearing, Councilmember Falconer asked whether the City also may require, as a component of a small and local business program, that contractors employ a local workforce. Programs that require contractors to employ a local workforce, also known as "local hire" programs, may be legally problematic under the Privileges and Immunities Clause of the federal constitution, which prohibits a state from discriminating between its residents and non-residents without a "substantial reason" for doing so. U.S. Const., Art. IV § 2.cl.1; *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 222 (1984).

In *Camden*, the U.S. Supreme Court analyzed a Camden, New Jersey, ordinance requiring that 40% of employees working on city construction projects be Camden residents. *Id.* at 210. The Court found that the ordinance implicated the Privileges and Immunities Clause because the opportunity for non-residents to seek employment from private contractors was a basic privilege protected by the federal constitution. As such, the Court held, the City of Camden had to demonstrate a "substantial reason" for requiring a local workforce; specifically, the city

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had to show that non-residents “constituted a particular source of evil at which the statute was aimed.” *Id.* at 222, citing *Toomer v. Witsell*, 334 U.S. 385, 398 (1948).

If Council wishes to pursue a local workforce requirement, we recommend that Council first build a factual record as to why non-resident workers constitute “a particular source of evil” that needs to be remedied in San Diego. Further, we note that in order to qualify as “local” under the draft Small and Local Business Ordinance, a business must have its principle place of business and a significant employee presence in San Diego County. Although local *workforce* requirements may be difficult to justify, courts have generally upheld local *business* preferences as constitutional. *See, e.g. Big County Foods, Inc. v. Board of Education of the Anchorage School District*, 952 F.2d 1173, 1177-78 (9th Cir. 1992)(upholding Anchorage school district program providing 7 per cent preference to in-state milk producers because school district was acting as a “market-participant”).

IV. Bonding and Insurance

At the May 27, 2009 hearing, the Committee also asked the City Attorney to provide an overview of the City’s legal options for adjusting the City’s standard bonding and insurance requirements. The legal requirements for bonding and insurance requirements are as follows:

A. Legal Requirements for Bonding

The City requires various types of bonds from contractors to protect the City’s financial interests from risks inherent in public contracting. While bonding requirements are generally discretionary for goods, services, and consultants, certain types of bonds are mandatory for construction contracts pursuant to state or local law. There are three basic types of contract bonds: (1) bid bonds, (2) performance bonds, and (3) payment bonds. We discuss each type of bond, in turn, below:

1. Bid Bonds

A bid bond is a surety required from bidders on public works contracts to ensure the successful bidder executes the contract under the terms of its bid. *See* San Diego Charter § 94. If the successful bidder fails to execute the contract, the amount of the bid bond is forfeited to the agency letting the public works contract. Cal. Pub. Cont. Code § 20172.

The City Charter expressly requires bid bonds for construction contracts. San Diego City Charter section 94 states: “Each bidder shall furnish with his bid such security or deposit insuring the execution of the contract by him as shall be specified by the Council or as provided by general law.” As a charter city, the City may exercise authority over municipal affairs free from the constraints imposed by most general laws of the State. However, general law controls even a

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municipal affair where the City Charter adopts the general law by express provision. *Becker v. Council of City of Albany*, 47 Cal. App. 2d 702, 704, 707 (1941); 45 Cal. Jur. 3d *Municipalities* § 184 (2008). Since Council has not specified any other bid bond requirement, the language in Charter section 94 – “or as provided by general law” – expressly adopts general law governing bid bonds.

The California Public Contract Code requires that a bid bond shall be in an amount equal to at least 10 percent of the amount bid for all public works contracts over \$5,000. Cal. Pub. Cont. Code §§ 20162, 20171. A reduction of bid bond requirements below these minimums would violate state law, and is therefore not permissible under the City Charter unless Council chooses to specify an alternative percentage by ordinance.

2. Payment Bonds

Payment bonds are required by state law from general contractors to cover amounts that are not paid to a subcontractor due to a general contractor’s default. *See Black’s Law Dictionary*, p. 189 (8th ed. 2004); Cal. Civ. Code § 3247. The purpose of the payment bond law is to provide a statutory remedy for subcontractors in the event of default by the general contractor on a public works project. This is because the usual remedy of mechanic’s liens cannot be used against public entities. *California Electric Supply Co. v. United Pacific Life Ins.*, 227 Cal. App. 2d 138, 144 (1964); *Walt Rankin & Associates v. City of Murrieta*, 84 Cal. App. 4th 605, 625-626 (2000).

State law requires all general contractors awarded a public works contract over \$25,000 to file a payment bond with the public entity letting the contract. Cal. Civ. Code § 3247(a). This requirement applies to “every original contractor to whom is awarded a contract by a public entity.” Cal. Civ. Code § 3247(a). Under state law, the payment bond must be for 100 percent of the total amount payable under the contract. Cal. Civ. Code § 3248(a).

Although older cases provide that payment bond requirements do not apply to a charter city when a contract is purely a “municipal affair” (*see, e.g., Loop Lumber Company v. Van Loben Sels*, 173 Cal. 228, 234-235 (1916); *Williams v. Vallejo*, 36 Cal. App. 133, 140-141(1918)), we strongly recommend against removing or reducing state payment bond requirements. More recent cases have held that, in the event a public agency fails to comply with state statutes requiring bonds for the protection of subcontractors, the public agency is directly liable to the subcontractor. *See, e.g., Azusa Western, Inc. v. City of West Covina*, 45 Cal. App. 3d 259, 262-264 (1975) (holding City liable for failure to comply with state law release bond requirements). If payment bonds are later held to be a matter of statewide concern, and the City has failed to enforce state law

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requirements, the City may be directly liable to subcontractors for missed payments by the general contractor.

3. Performance Bonds

A performance bond is “[a] third party’s agreement to guarantee the completion of a construction contract upon the default of the general contractor.” Black’s Law Dictionary, p. 1174 (8th ed. 2004). Performance bonds protect the City’s financial interests by ensuring that a project is completed at no additional cost to the City in the event a contractor or developer is unable to finish a project.

The City Charter expressly requires performance bonds for construction contracts over \$100,000. City Charter section 94 states that, “For [public works] contracts exceeding \$100,000.00, the Council shall require each contractor to insure the faithful performance of his contract by delivering to the City a surety bond in an amount specified by the Council” Although Council has not formally specified an amount for performance bonds, the City currently requires performance bonds covering 100 percent of the total contract amount for most construction contracts.

There is no legal requirement for performance bonds for goods, services, and consultant contracts. However, the City regularly requires performance bonds for goods and services contracts and sometimes consultant contracts, which vary from a small percentage to 100 percent of the contract price depending on the nature of the contract.

Performance bonds provide the City with an expedited method for recovering against a non-performing contractor, short of having to file a breach of contract action. Therefore, we recommend that City staff consider the risk of non-performance and ease of replacing the contractor before adjusting performance bond requirements.

In conclusion, the City must include a bid bond requirement in the amount of 10 percent of the contract price for all construction projects over \$5,000 unless Council specifies an alternative percentage by ordinance. In addition, we strongly advise requiring payment bonds on construction contracts in the amount of 100 percent of the contract price. Performance bonds are required for construction projects over \$100,000 and are discretionary for goods, services, and consultant contracts. We recommend that City staff consider the risk of non-performance and the ease of replacement before removing or reducing performance bond requirements.

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B. Insurance

In addition to requiring contractors to file bonds, the City also typically requires contractors to provide insurance to protect the City from contracting risks. The Charter and the Municipal Code do not set forth specific insurance requirements. However, the Municipal Code authorizes the City to “require vendors and contractors to provide insurance and surety bonds for *contracts* and *public works contracts*.” San Diego Municipal Code § 22.3007. (Emphasis in original to indicate defined terms.) Standard insurance requirements are currently set by the Risk Management Department, and incorporated into contracts by the Purchasing and Contracting Department. We advise that City staff consult with Risk Management prior to removing or reducing insurance requirements on City contracts.

IV. CALTRANS Disparity Study

At the Committee’s May 27, 2009 hearing, Councilmember Frye asked whether, in lieu of a small or local business program, the City could utilize the results of the CALTRANS disparity study to implement a race or gender-conscious program. We advise against this approach for the following reasons:

First, California courts still have not resolved whether the results of a disparity study will support a race or gender-conscious program against constitutional challenge. As discussed above, the California Constitution prohibits preferences based on race or gender in public contracting. Proposition 209, codified in the California Constitution, 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).

A case pending before the California Supreme Court, *Coral Construction, Inc. v. City and County of San Francisco*, 149 Cal. App. 4th 1218 (2007), *review granted* August 22, 2007, suggests that federal equal protection principles may trump Proposition 209 in cases of severe intentional discrimination. In *Coral*, the City of San Francisco used the results of its disparity study to support a race and gender-conscious contracting program. The appellate court held that, as a matter of law, evidence of severe and intentional discrimination could support a race and gender-conscious program under federal law notwithstanding Proposition 209. *Id.* at 1246-50. However, *Coral* is currently under review by the California Supreme Court.

Second, even if *Coral* is upheld, the City of San Diego would need to conduct its own, particularized disparity study in order to support a race or gender-based program. Federal law requires that a race or gender-based 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, a program may not be based on a broad-based disparity study. *See, e.g.,*

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Fullilove v. Klutznick, 448 U.S. 448, 504-05 (1980) (generalized findings of discrimination in the national or statewide marketplace did not establish a “compelling state interest” in a program targeting the Richmond construction industry). Rather, race and gender-based programs must be based on particularized findings of discrimination in the specific location and industries that the program targets. *Id.*⁵

The CALTRANS study, which was issued in June 2007, examines contracts awarded throughout the state in each of the CALTRANS Districts. CALTRANS District 11 includes all of San Diego County and Imperial County, not just the City of San Diego. Since the CALTRANS study was a state-wide study, with only limited data specific to the San Diego market, a court is not likely to find it sufficiently particularized to support a race or gender-based program for the City of San Diego.

If the City wishes to pursue a race or gender-conscious program to remedy discrimination in the City of San Diego, 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. We also recommend following the Supreme Court’s progress in the *Coral* case. Our Office stands ready to provide updates on the *Coral* case as requested.

CONCLUSION

The proposed Small and Local Business Ordinance and revisions to Council Policy 100-10 provide legally permissible mechanisms for promoting diversity in construction, goods, services, and consultant contracts. We would not recommend including a local workforce requirement unless and until Council has made factual findings regarding why non-resident workers present a particular “source of evil” to be remedied. The City may consider adjusting performance bond requirements and insurance requirements. However, adjustments, if any, should only be made after careful evaluation of the associated risks and consultation with Risk Management. The City’s bid bond requirement for construction contracts may be adjusted by ordinance, but payment bond requirements are required by state law and may not be modified.

⁵ For a complete discussion of the *Coral*, *Crosen* and *Fullilove* decisions, see City Att’y MOL No. 07-13 (Sept. 10, 2007), entitled “Overview of Law Concerning Equal Opportunity in Contracting: Existing Programs and Recommendations.”

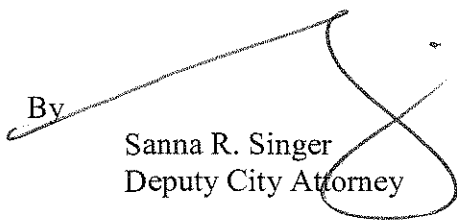
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The City may not use the results of the CALTRANS disparity study as a basis for an alternative, race or gender-based program because, even if such a program were permissible, the study does not include findings specific to the City of San Diego.

Respectfully submitted,

By



Sanna R. Singer
Deputy City Attorney

SRS:amt
Attachments
RC-2009-26

EXHIBIT A

STRIKEOUT ORDINANCE

OLD LANGUAGE: ~~STRIKEOUT~~

NEW LANGUAGE: UNDERLINE

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 30 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 22. 3002, RELATING TO CONTRACT DEFINITIONS, COMPETITIVE BIDDING PROCEDURES, AND CONTRACT ALTERATIONS; AND AMENDING CHAPTER 2, ARTICLE 2, DIVISION 36, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 22.3601, 22.3602, 22.3603, 22.3604, 22.3605, AND 22.3606; REPEALING SECTION 22.3607, AND AMENDING AND RENUMBERING SECTION 22.3608 TO SECTION 22.3607; ADDING NEW SECTION 22.3608 TITLED "APPEALS"; REPEALING SECTION 22.3609, AND ADDING NEW SECTION 22.3609 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED AT \$1,000,000 AND OVER"; AMENDING AND RENUMBERING SECTION 22.3610 TO 22.3611, AND ADDING NEW SECTION 22.3610 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED MORE THAN \$500,000 BUT LESS THAN \$1,000,000"; REPEALING SECTION 22.3612, AND AMENDING AND RENUMBERING SECTION 22.3611 TO SECTION 22.3612; AMENDING SECTIONS 22.3613, 22.3614 AND 22.3615; AMENDING AND RENUMBERING SECTION 22.3616 TO SECTION 22.3621, AND ADDING NEW SECTIONS 22.3616, 22.3617, 22.3618, 22.3619 AND 22.3620, ALL RELATING TO A SMALL AND LOCAL BUSINESS PROGRAM FOR PUBLIC WORKS CONTRACTS.

Article 2: Administrative Code

Division 30: Contract Definitions, Competitive Bidding Procedures, and Contract Alterations

§ 22.3003 Definitions

Terms defined in Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36 are indicated by italics. For purposes of Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36:

Agency through Maintenance Contracts [No change in text.]

Major public works contract means a *public works contract* valued at more than \$2500,000.

Minor public works contract means a *public works contract* valued at \$2500,000 or less.

Person through Valued at [No change in text.]

Article 2: Administrative Code

Division 36: Small and Local Business Program for Public Works Contracts

§ 22.3601 Purpose

The City Council wants to create programs intended to ~~increase outreach to and use of historically underutilized construction contractors~~ enhance diversity in City contracts, increase competition, and stimulate the local economy by providing opportunities to small and local businesses. In addition, the City has a compelling interest in ensuring that it is neither an active nor passive participant in marketplace discrimination, and in promoting equal opportunity for all segments of the contracting community. ~~The City Council intends to create a minor~~

construction program to fulfill that purpose and to assist these contractors. This ~~d~~Division is, therefore, intended to provide different advertisement, bidding, award, and contract administration policies and procedures for *minor public works contracts* as distinguished from *major public works contracts*, while continuing to ensure that the City's contracting procedures are fair and that competitive pricing is considered establishes a small and local business program for *public works contracts*, which includes: (1) small and local business bid preferences and mandatory subcontractor participation requirements for *major public works*, and (2) a sheltered competition program for *minor public works*. This program is intended to provide a race and gender-neutral tool to expand opportunities for, and develop the capacity of, small and local firms so that all segments of the community may participate in *City contracts*.

§ 22.3602 **Applicability**

This ~~d~~Division is to apply when the City seeks contractors to perform *minor* applies to all *public works contracts*, except that it does not apply to *minor public works contracts* when the work to be performed consists primarily of acquisition of equipment or fabricated parts where the onsite labor required to install the equipment or parts amounts to less than 25% of the total value of the *contract as determined at the time of bid opening for contracts that are not "municipal affairs" under article II, section 5 of the California Constitution.*

§ 22.3603 **Definitions**

Defined terms used in this ~~d~~Division appear in italics. For purposes of this ~~d~~Division:

Emerging ~~b~~Business Enterprise or EBE means a business whose gross income does not exceed the amount specified in the Emerging Business Size Standards Caps for each type of business listed on the document on file in the City Clerk's Office as Document No. OO-19095-1, as it is amended from time to time, annual receipts do not exceed the amount set by the City Manager, and that meets all other criteria set forth in regulations implementing this Division. The City Manager shall review the threshold amount for EBEs on an annual basis, and adjust as necessary to reflect changes in the marketplace.

Emerging Local Business Enterprise or ELBE means a Local Business Enterprise that is also an Emerging Business Enterprise.

Local Business Enterprise or LBE means a business that has both a principle place of business and significant employee presence in the County of San Diego, and that has been in operation for twelve (12) consecutive months.

Principle Place of Business means a location where a business maintains a physical office and through which it obtains no less than fifty percent of its gross annual receipts.

Protégé shall mean a business that has been approved and is an active participant in the City of San Diego's Mentor-Protégé Program, has signed the required program participation agreement and has been assigned a mentor.

Significant Employee Presence means no less than twenty-five percent of a business's total number of employees.

Small ~~b~~Business Enterprise or SBE means a business whose gross income does not exceed the amount specified in the Small Business Size Standards Caps for

~~each type of business listed on the document on file in the City Clerk's Office as Document No. OO 19095-1, as it is amended from time to time~~ annual receipts do not exceed the amount set by the City Manager, and that meets all other criteria set forth in regulations implementing this Division. The City Manager shall review the threshold amount for SBEs on an annual basis, and adjust as necessary to reflect changes in the marketplace. A business certified as a Disabled Veteran Business Enterprise by the State of California, and that has provided proof of such certification to the City Manager, shall be deemed to be an SBE.

Small Local Business Enterprise or SLBE means a Local Business Enterprise that is also a Small Business Enterprise.

§ 22.3604 Determination of Value of a Public Works Contract

- (a) ~~The value of a contract~~ public works contract shall be determined at bid opening by the City Manager's estimate of the costs of construction. For purposes of determining the value of a contract at the time of bid opening, only the proposed costs of construction, not design costs or the City's contract administration costs, are to be considered. For Design-Build contracts, as defined by Division 33 of this Article, the costs of design shall be included in the City Manager's estimate.
- (b) ~~The City Manager must tentatively determine~~ shall estimate a proposed public works contract's value prior to commencing contractor selection so that proper procedures may be used for to advertising, bidding, and award the contract.

- (c) If minor public works contracts advertising, bidding, and award procedures are used, ~~t~~The fact that one or more of the bids are received that exceeds the \$2500,000 limit for using the minor construction bidding and award procedures does not render the procedures or invalid or the award of a ~~contract~~ public works contract invalid. However, if *minor public works contracts advertising, bidding, and award procedures are* were used, for bidding and all bids the Manager finds that acceptance of the lowest responsible bidder on a particular *public works contract* would make the value of the executed *contract*, excluding design and City administration costs, exceed the \$2550,000, limit for use of those procedures, the City Manager must reject the bids and commence advertising and bidding procedures for *major public works contracts*.

§ 22.3605 **Establishment of ~~Minor Public Works Contract Availability~~ SLBE and ELBE Lists**

- (a) The City Manager shall establish and maintain a list of eligible *small businesses* ~~SLBEs~~ and a list of eligible *emerging businesses* ~~ELBEs~~, that have indicated a desire to enter into *public works contracts* with the City. The City will use these two lists to award for the purposes of awarding minor public works contracts. ~~The emerging business list will be known as Document No. OO 19095 2 and the small business list will be known as Document No. OO 19095 3. The City Manager may amend these lists from time to time in accordance with the directions set forth in this division and with regulations adopted by the Manager.~~

- (b) ~~Small businesses and emerging businesses appearing on these lists will be further sub-divided into separate disciplines and license types based on the state of California's contractors' licensing scheme.~~
- (c) ~~Eligible businesses will be placed on the appropriate sub-lists according to the type of California contractor's license they hold. A contractor may hold more than one type of California contractor's license and a contractor's name may appear on more than one sub-list in accordance with types of licenses held. Within each contractor's license type sub-list, eligible businesses will be placed and maintained on the list in accordance with the date of their completed application submitted in accordance with the application process adopted under Section 22.3605.~~

The SLBE and ELBE eligibility lists will include information regarding the licenses held and disciplines of each business on the list.

§ 22.3606 Eligibility for ~~Minor Public Works Contract Availability~~ SLBE and ELBE Lists

- (a) Except as provided in Section 22.3606(b), to be eligible to be placed on the appropriate ~~availability eligibility~~ list, an SLBE ~~small business~~ or ~~emerging business~~ ELBE shall:
- (1) be owned by construction professionals licensed by the California Contractors State Licensing Board; ~~and~~
 - (2) be owned by construction professionals in good standing with the City of San Diego; ~~and~~
 - (3) have a City of San Diego Business Tax Certificate authorizing ~~them~~ it to do business in this City; ~~and~~

- (4) ~~upon request of the City, provide a signed statement of an authorized representative of the business affirming that the business's gross income does not exceed the applicable limits specified in the Small Business and Emerging Business Size Standards in Document No. OO 19095-1 on file in the City Clerk's office. it meets the eligibility requirements of an SLBE or ELBE set forth in this Division and implementing regulations.~~ The statement of gross income shall be signed under penalty of perjury under California law; and
- (5) submit a completed application ~~to the City Manager in accordance with the process established by Section 22.3607 procedures established by the City Manager. Protégés may submit their Mentor-Protégé application and signed participation agreement in lieu of the application required by this section.~~
- (b) ~~In addition to meeting the criteria in Section 22.3606(a), a *small or emerging business*~~ A business may also be owned by construction contractors certified as a Small Business Minority-owned Business Enterprise, Woman-owned Business Enterprise, or Disadvantaged Business, or as a Disabled Veteran Business Enterprise, or certified as both, by the California Department of General Services any department of the State of California or other public agency recognized by the City of San Diego as a certifying agency is not precluded from becoming eligible as an SLBE or ELBE. However, such certification does not eliminate the

necessity for meeting the other-eligibility-criteria requirements specified in Section 22.3606 for an *SLBE* or *ELBE*.

- (c) ~~The City Manager may determine that certain businesses are ineligible to be placed on the *small or emerging business* availability lists, because those businesses hold only those types of California licenses issued to *persons* not primarily engaged in public works construction. This determination shall be in writing and the availability lists shall be amended to reflect this determination.~~

~~§ 22.3607~~ **Application Process for Placement on Availability List**

~~The City Manager shall establish an application process for determining whether a particular business is eligible to be placed on the *small business or emerging business* availability lists.~~

§ 22.36087 **Removal from Availability Lists and Reinstatement**

- (a) The City Manager shall remove ~~A~~ an *small SLBE* or *emerging business ELBE* may be removed from the applicable *public works contract* availability list if the business submits a non-responsive bid to the City's solicitation of bid at least four times within the City's fiscal year. from the applicable eligibility list:
- (1) two years after approval of the *SLBE*'s or *ELBE*'s application; or
 - (2) immediately, in the event the business has used its status as an *SLBE* or *ELBE* to assist another business in obtaining benefits of this Division to which the other business would not otherwise be entitled, or for any other fraudulent purpose.

(b) ~~Small businesses or emerging businesses that have been awarded more than \$1,000,000 in City public works contracts within a City fiscal year will be removed from the list in that fiscal year and will be eligible for reinstatement to the list in future fiscal years upon establishing that the business meets the gross income limits in Document No. OO 19095-1 on file in the City Clerk's office.~~

A business that has been removed from an eligibility list under Section 22.3607(a)(1) may be reinstated after establishing that the business qualifies as an SLBE or ELBE and successfully completes the City Manager's application process for reinstatement.

§ 22.3608 Appeals

A business that has been denied SLBE or ELBE eligibility, or removed from an eligibility list under Section 22.3607(a)(2), may file an appeal within 15 days of the denial or removal. The City Manager shall establish procedures for the filing, granting and denial of appeals, which shall include the opportunity for a hearing.

§ 22.3609 Reinstatement Following Removal from List; Re-application Required

~~If a small or emerging business has been removed from the applicable minor public works contracts availability list for the reasons listed in Section 22.3608, the business may be reinstated to the list only after the business has successfully completed the Manager's application process for reinstatement.~~

§ 22.3609 **Solicitation of Bids for and Award of Major Public Works Contracts Valued at \$1,000,000 and Over**

The City Manager shall, on a project-by-project basis, include a mandatory subcontractor participation requirement for *SLBEs* and/or *ELBEs*. Bids that do not reach the mandatory subcontractor participation requirement, or demonstrate good faith efforts to do so, will be deemed nonresponsive and ineligible for award. *SLBE* and *ELBE* prime contractors will be deemed to have met the subcontractor participation requirement, provided that the *SLBE* or *ELBE* prime contractor self-performs at least 51 percent of the *public works contract*.

§ 22.3610 **Solicitation of Bids for and Award of Major Public Works Contracts Valued at More Than \$500,000 but Less Than \$1,000,000**

In addition, the City Manager shall, on a project-by-project basis, do one or both of the following for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000:

- (a) Permit a bid discount of:
- (1) 5 percent for *SLBE* or *ELBE* prime contractors; or
 - (2) the amount of *SLBE* or *ELBE* subcontractor participation up to a maximum of 5 percent. The discount will not apply if an award to the discounted bidder would result in a total contract cost of \$50,000 in excess of the lowest, non-discounted bid. In the event of a tie bid between a discounted bidder and non-discounted bidder, the discounted bidder will be awarded the *public works contract*.

- (b) Include a mandatory subcontractor participation requirement for *SLBEs* or *ELBEs*. Bids that do not reach the mandatory subcontractor participation requirement, or demonstrate good faith efforts to do so, will be deemed nonresponsive and ineligible for award. *SLBE* and *ELBE* prime contractors will be deemed to have met the subcontractor participation requirement, provided that the *SLBE* or *ELBE* prime contractor self-performs at least 51 percent of the *public works contract*.

§ 22.36101 Solicitation of Bids for and Award of Minor Public Works Contracts Valued at More Than \$250,000 but Less Than or Equal to \$25500,000

- (a) *Minor public works contracts* valued at more than \$250,000 but less than or equal to \$25500,000 shall be awarded through a competitive bid process open only to businesses listed on the *small SLBE* or *emerging-businesses ELBE* availability eligibility lists.
- (b) ~~The City Manager shall solicit a minimum of five bids for each proposed contract in accordance with procedures in Sections 22.3610(c) and (d).~~
The lowest responsible and reliable *SLBE* or *ELBE* bidder shall be awarded the *public works contract*. If there are no responsible bids, the City Manager shall follow the advertising, bidding, and award procedures for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000 as set forth in Section 22.3610.
- (c) ~~Bids shall be solicited first from the appropriate license sub-list on the *emerging-business* list established by the City Manager pursuant to Section 22.3605, if at least five are available. Businesses within each license type sublist on the *emerging-business* list will be rotated to~~

~~determine which businesses will be eligible to participate in a particular bid process. Nothing in this section shall limit the City Manager's right to reject all bids in the event that all bids received exceed the City's projected costs for a particular public works contract.~~

- (d) ~~If five bid solicitations from qualified contractors are not available from the emerging business list, the Manager may solicit bids from the appropriate license sub-list on the *small business* list to make up the deficit. Businesses within each sub-license type on the small business list will be rotated to determine which businesses will be eligible to participate in a particular bid process.~~

~~§ 22.3612 Names on Lists to be Rotated to Ensure Fairness~~

~~The Manager shall establish a rotation scheme that will ensure that eligible businesses are given a fair opportunity to participate in the City's contracting process under Sections 22.3610 and 22.3611.~~

~~§ 22.36112 Solicitation of Bids for and Award of Minor Public Works Contracts Valued at \$250,000 and Under~~

- (a) ~~Minor public works contracts valued at \$250,000 or less shall be awarded through a competitive bid process open only to businesses listed on the *small or emerging businesses ELBE* availability eligibility lists in accordance with procedures set forth in this Section unless there are no businesses on the ELBE eligibility list that have the requisite licenses for the contract, in which case the competitive bid process will also be open to SLBEs.~~

- (b) ~~The City Manager shall solicit bids from five businesses from the appropriate license sub-list on the *emerging business* list, if at least five are available. Businesses within each license type sub-list on the *emerging business* list will be rotated to determine which businesses will be eligible to participate in a particular bid process.~~

The lowest responsible and reliable *ELBE* bidder shall be awarded the *public works contract*. If there are no responsible bids, the City Manager shall follow the advertising, bidding, and award procedures for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000 as set forth in Section 22.3610.

- (c) ~~If five bid solicitations from qualified contractors are not available from the *emerging business* list, the Manager may solicit bids from the appropriate license sub-list on the *small business* list to make up the deficit. Businesses within each license type on the *small business* list will be rotated to determine which businesses will be eligible to participate in a particular bid process. Nothing in this section shall limit the City Manager's right to reject all bids in the event that all bids received exceed the City's projected costs for a particular *public works contract*.~~

§ 22.3613 Plans and Specifications to be Provided Free of Charge to Small SLBEs or Emerging Businesses ELBEs

Plans and specifications for *minor public works contracts* will be provided free of cost to *small SLBEs* and *emerging businesses ELBEs*.

§ 22.3614 **Emergency Contracts**

- (a) Based on the City Manager's written determination that an *emergency* exists requiring immediate action, the City Manager may execute a *minor public works contract* valued at ~~\$1025,000~~ to ~~\$5075,000~~ so long as the City Manager has received ~~oral or~~ written quotes for the proposed work from at least five ~~two persons~~ businesses ~~from on~~ either the *emerging SLBE* or *small-business ELBE* eligibility lists.
- (b) Based on the City Manager's written determination that an *emergency* exists requiring immediate action, the City Manager may execute a *minor public works contract* valued at less than ~~\$1025,000~~ so long as the City Manager has received ~~an oral or~~ written quotes for the proposed work from at least one ~~person~~ business ~~from on~~ either the *emerging SLBE* or *small-business ELBE* eligibility lists.

§ 22.3615 **Effect of Amendments to Minor Public Works Contracts**

As long as the original value of a *minor public works contract* as determined at bid opening is less than or equal to ~~\$2500,000~~, any future amendments increasing the value of that *contract* do not render the bidding, award or administration process invalid.

§ 22.3616 **Reduction in Subcontracts**

All prime contractors shall notify and obtain prior written approval of the City Manager for any reduction in subcontract scope, termination, or substitution of an SLBE or ELBE subcontractor.

§ 22.3617 **Waivers**

The intent of this Division is to maximize the opportunity for *SLBE* and *ELBE* prime and subcontractor participation in City *public works contracts*. However, the City Manager may grant written waivers of *SLBE* and *ELBE* bid preferences or subcontractor participation requirements on a project-by-project basis when in the best interests of the City. The City Manager shall establish procedures for granting and documenting waivers, and shall report quarterly to the City Council regarding such waivers.

§ 22.3618 **Bonding and Insurance**

The City Manager may, on a project-by-project basis, adjust bonding and insurance requirements on *public works contracts* to enhance opportunities for *SLBEs* and *ELBEs* to the extent permitted by law. The City Manager shall consult with the Risk Management Department before making any such adjustment on a particular *public works contract* to ensure that the City is adequately protected against liability.

§ 22.3619 **Technical Assistance**

The City Manager may establish technical assistance programs to assist *SLBEs* and *ELBEs* in applying for business-type certifications, becoming eligible for *minor public works contracts*, securing necessary bonding and insurance, and generally complying with the City's advertising, bidding, and award process.

§ 22.3620 **Packaging of Public Works Contracts**

The City Manager shall meet with relevant City departments on an annual basis to review the percentage of *public works contracts* that qualify as *minor public works contracts*. The City Manager shall make recommendations as necessary regarding the packaging of *public works contracts* to maximize the intent of this Division, where appropriate and to the extent permitted by law.

§ 22.361621 **City Manager to Adopt Regulations**

The City Manager shall ~~adopt regulations to~~ develop and implement administrative policies, rules, and regulations to carry out the intent of this Division.

SRS:amt
10/22/09
Or.Dept:CityAtty
O-2010-28

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 30 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 22. 3002, RELATING TO CONTRACT DEFINITIONS, COMPETITIVE BIDDING PROCEDURES, AND CONTRACT ALTERATIONS; AND AMENDING CHAPTER 2, ARTICLE 2, DIVISION 36, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 22.3601, 22.3602, 22.3603, 22.3604, 22.3605, AND 22.3606; REPEALING SECTION 22.3607, AND AMENDING AND RENUMBERING SECTION 22.3608 TO SECTION 22.3607; ADDING NEW SECTION 22.3608 TITLED "APPEALS"; REPEALING SECTION 22.3609, AND ADDING NEW SECTION 22.3609 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED AT \$1,000,000 AND OVER"; AMENDING AND RENUMBERING SECTION 22.3610 TO 22.3611, AND ADDING NEW SECTION 22.3610 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED MORE THAN \$500,000 BUT LESS THAN \$1,000,000"; REPEALING SECTION 22.3612, AND AMENDING AND RENUMBERING SECTION 22.3611 TO SECTION 22.3612; AMENDING SECTIONS 22.3613, 22.3614 AND 22.3615; AMENDING AND RENUMBERING SECTION 22.3616 TO SECTION 22.3621, AND ADDING NEW SECTIONS 22.3616, 22.3617, 22.3618, 22.3619 AND 22.3620, ALL RELATING TO A SMALL AND LOCAL BUSINESS PROGRAM FOR PUBLIC WORKS CONTRACTS.

WHEREAS, the City of San Diego desires to provide contracting opportunities to a broad cross-section of the community in order to enhance diversity and increase competition in City contracts; and

WHEREAS, the City of San Diego has a compelling interest in ensuring that it is neither an active nor passive participant in marketplace discrimination; and

WHEREAS, the City of San Diego also has a compelling interest in stimulating the local economy by providing opportunities for small and local businesses to grow, succeed and create jobs; and

WHEREAS, the City Council has heard testimony from City staff and the community, considered statistical evidence, and reviewed programs in neighboring jurisdictions, in an effort to identify a program best-suited to achieve these goals; and

WHEREAS, the City Council declares that a small and local business preference program would provide an effective, race and gender-neutral tool for achieving the City's goals of enhancing diversity in City contracts, ensuring open and fair competition, and promoting a robust local economy; and

WHEREAS, the City Charter section 94 authorizes the City Council to set a dollar amount under which the City is not required to award public works contracts to the lowest responsible and reliable bidder; NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter 2, Article 2, Division 30 of the San Diego Municipal Code is amended by amending Sections 22.3003, to read as follows:

Article 2: Administrative Code

Division 30: Contract Definitions, Competitive Bidding Procedures, and Contract Alterations

§ 22.3003 Definitions

Terms defined in Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36 are indicated by italics. For purposes of Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36:

Agency through Maintenance Contracts [No change in text.]

Major public works contract means a *public works contract* valued at more than \$500,000.

Minor public works contract means a *public works contract* valued at less than \$500,000.

Person through Valued at [No change in text.]

Section 2. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending Sections 22.3601, 22.3602, 22.3603, 22.3604, 22.3605 and 22.3606, to read as follows:

Article 2: Administrative Code

Division 36: Small and Local Business Program for Public Works Contracts

§ 22.3601 Purpose

The City Council wants to create programs intended to enhance diversity in City contracts, increase competition, and stimulate the local economy by providing opportunities to small and local businesses. In addition, the City has a compelling interest in ensuring that it is neither an active nor passive participant in marketplace discrimination, and in promoting equal opportunity for all segments of the contracting community. This Division, therefore, establishes a small and local business program for *public works contracts*, which includes: (1) small and

local business bid preferences and mandatory subcontractor participation requirements for *major public works*, and (2) a sheltered competition program for *minor public works*. This program is intended to provide a race and gender-neutral tool to expand opportunities for, and develop the capacity of, small and local firms so that all segments of the community may participate in City *contracts*.

§ 22.3602 *Applicability*

This Division applies to all *public works contracts* except for *contracts* that are not “municipal affairs” under article II, section 5 of the California Constitution.

§ 22.3603 *Definitions*

Defined terms used in this Division appear in italics. For purposes of this Division:

Emerging Business Enterprise or *EBE* means a business whose gross annual receipts do not exceed the amount set by the City Manager, and that meets all other criteria set forth in regulations implementing this Division. The City Manager shall review the threshold amount for *EBEs* on an annual basis, and adjust as necessary to reflect changes in the marketplace.

Emerging Local Business Enterprise or *ELBE* means a *Local Business Enterprise* that is also an *Emerging Business Enterprise*.

Local Business Enterprise or *LBE* means a business that has both a *principle place of business* and *significant employee presence* in the County of San Diego, and that has been in operation for twelve (12) consecutive months.

Principle Place of Business means a location where a business maintains a physical office and through which it obtains no less than fifty percent of its gross annual receipts.

Protégé shall mean a business that has been approved and is an active participant in the City of San Diego's Mentor-Protégé Program, has signed the required program participation agreement and has been assigned a mentor.

Significant Employee Presence means no less than twenty-five percent of a business's total number of employees.

Small Business Enterprise or *SBE* means a business whose gross annual receipts do not exceed the amount set by the City Manager, and that meets all other criteria set forth in regulations implementing this Division. The City Manager shall review the threshold amount for *SBEs* on an annual basis, and adjust as necessary to reflect changes in the marketplace. A business certified as a Disabled Veteran Business Enterprise by the State of California, and that has provided proof of such certification to the City Manager, shall be deemed to be an *SBE*.

Small Local Business Enterprise or *SLBE* means a *Local Business Enterprise* that is also a *Small Business Enterprise*.

§ 22.3604 Determination of Value of a Public Works Contract

- (a) The value of a *public works contract* shall be determined by the City Manager's estimate of the costs of construction. For *Design-Build contracts*, as defined by Division 33 of this Article, the costs of design shall be included in the City Manager's estimate.

- (b) The City Manager shall estimate a proposed *public works contract's* value prior to commencing contractor selection so that proper procedures may be used to advertise, bid, and award the contract.
- (c) If *minor public works contracts* advertising, bidding, and award procedures are used, the fact that one or more of the bids received exceeds \$500,000 does not render the procedures or award of a *public works contract* invalid. However, if *minor public works contracts* advertising, bidding, and award procedures are used, and all bids exceed \$550,000, the City Manager must reject the bids and commence procedures for *major public works*.

§ 22.3605 Establishment of SLBE and ELBE Lists

- (a) The City Manager shall establish and maintain a list of eligible *SLBEs* and a list of eligible *ELBEs*, for the purposes of awarding *minor public works contracts*.
- (b) The *SLBE* and *ELBE* eligibility lists will include information regarding the licenses held and disciplines of each business on the list.

§ 22.3606 Eligibility for SLBE and ELBE Lists

- (a) Except as provided in Section 22.3606(b), to be eligible to be placed on the appropriate eligibility list, an *SLBE* or *ELBE* shall:
 - (1) be owned by construction professionals licensed by the California Contractors State Licensing Board;
 - (2) be owned by construction professionals in good standing with the City of San Diego;

- (3) have a City of San Diego Business Tax Certificate authorizing it to do business in this City;
 - (4) provide a signed statement of an authorized representative of the business affirming that it meets the eligibility requirements of an *SLBE* or *ELBE* set forth in this Division and implementing regulations. The statement shall be signed under penalty of perjury under California law; and
 - (5) submit a completed application in accordance with procedures established by the City Manager. *Protégés* may submit their Mentor-Protégé application and signed participation agreement in lieu of the application required by this section.
- (b) A business certified as a Minority-owned Business Enterprise, Woman-owned Business Enterprise, or Disadvantaged Business, by any department of the State of California or other public agency recognized by the City of San Diego as a certifying agency is not precluded from becoming eligible as an *SLBE* or *ELBE*. However, such certification does not eliminate the necessity for meeting the requirements for an *SLBE* or *ELBE*.

Section 3. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by repealing Section 22.3607, and amending and renumbering Section 22.3608 to Section 22.3607, to read as follows:

§ 22.3607 Removal and Reinstatement

- (a) The City Manager shall remove an *SLBE* or *ELBE* from the applicable eligibility list:
- (1) two years after approval of the *SLBE*'s or *ELBE*'s application; or
 - (2) immediately, in the event the business has used its status as an *SLBE* or *ELBE* to assist another business in obtaining benefits of this Division to which the other business would not otherwise be entitled, or for any other fraudulent purpose.
- (b) A business that has been removed from an eligibility list under Section 22.3607(a)(1) may be reinstated after establishing that the business qualifies as an *SLBE* or *ELBE* and successfully completes the City Manager's application process for reinstatement.

Section 4. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by adding new Section 22.3608 titled "Appeals," to read as follows:

§ 22.3608 Appeals

A business that has been denied *SLBE* or *ELBE* eligibility, or removed from an eligibility list under Section 22.3607(a)(2), may file an appeal within 15 days of the denial or removal. The City Manager shall establish procedures for the filing, granting and denial of appeals, which shall include the opportunity for a hearing.

Section 5. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by repealing Section 22.3609 and adding new Section 22.3609 titled "Solicitation of Bids for and Award of Major Public Works Contracts Valued at \$1,000,000 and Over," to read as follows:

§ 22.3609 Solicitation of Bids for and Award of Major Public Works Contracts Valued at \$1,000,000 and Over

The City Manager shall, on a project-by-project basis, include a mandatory subcontractor participation requirement for *SLBEs* and/or *ELBEs* for *major public works contracts* valued at \$1,000,000 or more. Bids that do not reach the mandatory subcontractor participation requirement, or demonstrate good faith efforts to do so, will be deemed nonresponsive and ineligible for award. *SLBE* and *ELBE* prime contractors will be deemed to have met the subcontractor participation requirement, provided that the *SLBE* or *ELBE* prime contractor self-performs at least 51 percent of the *public works contract*.

Section 6. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending and renumbering Section 22.3610 to new Section 22.3611, and adding new Section 22.3610 titled "Solicitation of Bids for and Award of Major Public Works Contracts Valued More Than \$500,000 but Less Than \$1,000,000," to read as follows:

§ 22.3610 Solicitation of Bids for and Award of Major Public Works Contracts Valued at More Than \$500,000 but Less Than \$1,000,000

In addition, the City Manager shall, on a project-by-project basis, do one or both of the following for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000:

- (a) Permit a bid discount of:
 - (1) 5 percent for *SLBE* or *ELBE* prime contractors; or
 - (2) the amount of *SLBE* or *ELBE* subcontractor participation up to a maximum of 5 percent. The discount will not apply if an award to the discounted bidder would result in a total contract cost of

\$50,000 in excess of the lowest, non-discounted bid. In the event of a tie bid between a discounted bidder and non-discounted bidder, the discounted bidder will be awarded the *public works contract*.

- (b) Include a mandatory subcontractor participation requirement for *SLBEs* or *ELBEs*. Bids that do not reach the mandatory subcontractor participation requirement, or demonstrate good faith efforts to do so, will be deemed nonresponsive and ineligible for award. *SLBE* and *ELBE* prime contractors will be deemed to have met the subcontractor participation requirement, provided that the *SLBE* or *ELBE* prime contractor self-performs at least 51 percent of the *public works contract*.

§ 22.3611 Solicitation of Bids for and Award of Minor Public Works Contracts Valued at More Than \$250,000 but Less Than or Equal to \$500,000

- (a) *Minor public works contracts* valued at more than \$250,000 but less than or equal to \$500,000 shall be awarded through a competitive bid process open only to businesses listed on the *SLBE* or *ELBE* eligibility lists.
- (b) The lowest responsible and reliable *SLBE* or *ELBE* bidder shall be awarded the *public works contract*. If there are no responsible bids, the City Manager shall follow the advertising, bidding, and award procedures for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000 as set forth in Section 22.3610.

- (c) Nothing in this section shall limit the City Manager's right to reject all bids in the event that all bids received exceed the City's projected costs for a particular *public works contract*.

Section 7. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by repealing Section 22.3612, and amending and renumbering Section 22.3611 to Section 22.3612, to read as follows:

§ 22.3612 Solicitation of Bids for and Award of Minor Public Works Contracts Valued at \$250,000 and Under

- (a) *Minor public works contracts valued at \$250,000 or less shall be awarded through a competitive bid process open only to businesses listed on the ELBE eligibility list unless there are no businesses on the ELBE eligibility list that have the requisite licenses for the contract, in which case the competitive bid process will also be open to SLBEs.*
- (b) The lowest responsible and reliable *ELBE* bidder shall be awarded the *public works contract*. If there are no responsible bids, the City Manager shall follow the advertising, bidding, and award procedures for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000 as set forth in Section 22.3610.
- (c) Nothing in this section shall limit the City Manager's right to reject all bids in the event that all bids received exceed the City's projected costs for a particular *public works contract*.

Section 8. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending Sections 22.3613, 22.3614 and 22.3615, to read as follows:

§ 22.3613 Plans and Specifications to be Provided Free of Charge to SLBEs or ELBEs

Plans and specifications for *minor public works contracts* will be provided free of cost to *SLBEs* and *ELBEs*.

§ 22.3614 Emergency Contracts

- (a) Based on the City Manager's written determination that an *emergency* exists requiring immediate action, the City Manager may execute a *minor public works contract* valued at \$25,000 to \$75,000 so long as the City Manager has received written quotes for the proposed work from at least two businesses on either the *SLBE* or *ELBE* eligibility lists.
- (b) Based on the City Manager's written determination that an *emergency* exists requiring immediate action, the City Manager may execute a *minor public works contract* valued at less than \$25,000 so long as the City Manager has received written quotes for the proposed work from at least one business on either the *SLBE* or *ELBE* eligibility lists.

§ 22.3615 Effect of Amendments to Minor Public Works Contracts

As long as the original value of a *minor public works contract* as determined at bid opening is less than or equal to \$500,000, any future amendments increasing the value of that *contract* do not render the bidding, award or administration process invalid.

Section 9. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending and renumbering Section 22.3616 to Section 22.3621, and adding new Sections 22.3616, 22.3617, 22.3618, 22.3619 and 22.3620, to read as follows:

§ 22.3616 Reduction in Subcontracts

All prime contractors shall notify and obtain prior written approval of the City Manager for any reduction in subcontract scope, termination, or substitution of an *SLBE* or *ELBE* subcontractor.

§ 22.3617 Waivers

The intent of this Division is to maximize the opportunity for *SLBE* and *ELBE* prime and subcontractor participation in *City public works contracts*. However, the City Manager may grant written waivers of *SLBE* and *ELBE* bid preferences or subcontractor participation requirements on a project-by-project basis when in the best interests of the City. The City Manager shall establish procedures for granting and documenting waivers, and shall report quarterly to the City Council regarding such waivers.

§ 22.3618 Bonding and Insurance

The City Manager may, on a project-by-project basis, adjust bonding and insurance requirements on *public works contracts* to enhance opportunities for *SLBEs* and *ELBEs* to the extent permitted by law. The City Manager shall consult with the Risk Management Department before making any such adjustment on a particular *public works contract* to ensure that the City is adequately protected against liability.

§ 22.3619 Technical Assistance

The City Manager may establish technical assistance programs to assist *SLBEs* and *ELBEs* in applying for business-type certifications, becoming eligible for *minor public works contracts*, securing necessary bonding and

insurance, and generally complying with the City's advertising, bidding, and award process.

§ 22.3620 Packaging of Public Works Contracts

The City Manager shall meet with relevant City departments on an annual basis to review the percentage of *public works contracts* that qualify as *minor public works contracts*. The City Manager shall make recommendations as necessary regarding the packaging of *public works contracts* to maximize the intent of this Division, where appropriate and to the extent permitted by law.

§ 22.3621 City Manager to Adopt Regulations

The City Manager shall develop and implement administrative policies, rules, and regulations to carry out the intent of this Division.

Section 10. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been available to the City Council and the public prior to the day of its passage.

Section 11. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

APPROVED: JAN I. GOLDSMITH, City Attorney

By

Sanna R. Singer
Deputy City Attorney

SRS:amt
10/22/09
Or.Dept:CityAtty
O-2010-28

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor

CITY ATTORNEY DIGEST

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

EFFECTIVE DATE _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 30 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 22. 3002, RELATING TO CONTRACT DEFINITIONS, COMPETITIVE BIDDING PROCEDURES, AND CONTRACT ALTERATIONS; AND AMENDING CHAPTER 2, ARTICLE 2, DIVISION 36, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 22.3601, 22.3602, 22.3603, 22.3604, 22.3605, AND 22.3606; REPEALING SECTION 22.3607, AND AMENDING AND RENUMBERING SECTION 22.3608 TO SECTION 22.3607; ADDING NEW SECTION 22.3608 TITLED "APPEALS"; REPEALING SECTION 22.3609, AND ADDING NEW SECTION 22.3609 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED AT \$1,000,000 AND OVER"; AMENDING AND RENUMBERING SECTION 22.3610 TO 22.3611, AND ADDING NEW SECTION 22.3610 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED MORE THAN \$500,000 BUT LESS THAN \$1,000,000"; REPEALING SECTION 22.3612, AND AMENDING AND RENUMBERING SECTION 22.3611 TO SECTION 22.3612; AMENDING SECTIONS 22.3613, 22.3614 AND 22.3615; AMENDING AND RENUMBERING SECTION 22.3616 TO SECTION 22.3621, AND ADDING NEW SECTIONS 22.3616, 22.3617, 22.3618, 22.3619 AND 22.3620, ALL RELATING TO A SMALL AND LOCAL BUSINESS PROGRAM FOR PUBLIC WORKS CONTRACTS.

This ordinance makes changes to Chapter 2, Article 2, Division 30 of the San Diego Municipal Code by amending Sections 22.3003, relating to Contract Definitions, Competitive Bidding Procedures, and Contract Alterations. In addition, this ordinance makes changes to Chapter 2, Article 2, Division 36 of the San Diego Municipal Code by amending Sections

22.3601 through 22.3606; by repealing Section 22.3607, and amending and renumbering Section 22.3608 to 22.3607; by adding new Section 22.3608 titled "Appeals"; by repealing Section 22.3609, and adding new Section 22.3609 titled "Solicitation of Bids for and Award of Major Public Works Contracts Valued at \$1,000,000 and Over"; by amending and renumbering Section 22.3610 to 22.3611, and adding new Section 22.3610 titled "Solicitation of Bids for and Award of Major Public Works Contracts Valued at More than \$500,000 but Less Than \$1,000,000"; by repealing Section 22.3612, and amending and renumbering Section 22.2611 to 22.3612; by amending Sections 22.3613 through 22.3615; by amending and renumbering Section 22.3616 to Section 22.3621, and adding new Sections 22.3616 through 22.3620, all relating to a Small and Local Business Program for Public Works Contracts.

These amendments establish a small and local business program for public works contracts, which includes: (1) small and local business bid preferences and mandatory subcontractor participation requirements for major public works, and (2) a sheltered competition program for minor public works. This program is intended to provide a race and gender-neutral tool to expand opportunities for, and develop the capacity of, small and local firms so that all segments of the community will be able to participate in City contracts.

This ordinance contains a notice that a full reading of this ordinance is dispensed with prior to its final passage, since a written or printed copy will be available to the City Council and the public prior to the day of its passage.

This ordinance shall take effect and be in force on the thirtieth day from and after its final passage.

A complete copy of the Ordinance is available for inspection in the Office of the City Clerk of the City of San Diego, 2nd Floor, City Administration Building, 202 C Street, San Diego, CA 92101.

SRS:amt
10/22/09
Or.Dept:CityAtty
O-2010-28

EXHIBIT B

COUNCIL POLICY STRIKEOUT

OLD LANGUAGE: ~~Struck-Out~~

NEW LANGUAGE: Underlined

SUBJECT: SMALL AND LOCAL VENDOR BUSINESS PREFERENCE FOR GOODS, SERVICES, AND CONSULTANT CONTRACTS

POLICY NO.: 100-10

EFFECTIVE DATE: ~~September~~ November, 2009

BACKGROUND:

The City of San Diego expends millions of dollars annually in the procurement of ~~materials, supplies and~~ goods, services, and consultants 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.~~ there has been a lack of diversity among City contracts. In particular, small and emerging local businesses have faced challenges competing against established businesses with greater resources and access to capital.

The City desires to provide contracting opportunities to a broader cross-section of the community in order to enhance diversity and increase competition. In addition, the City has a compelling interest in ensuring that it is neither an active nor passive participant in marketplace discrimination. The City also has a compelling interest in stimulating the local economy by providing opportunities for small and local businesses to grow, succeed and create jobs for the citizens of San Diego.

The City Council has heard testimony from City staff and the community, considered statistical evidence, and reviewed programs in neighboring jurisdictions in an effort to identify a program best-suited to achieve these goals.

Based on this evidence, the City Council declares that a small and local business preference program would provide an effective, race and gender-neutral tool for achieving the City's goals of enhancing diversity in City contracts, ensuring open and fair competition, and promoting a robust local economy.

PURPOSE:

The purpose of this policy is to ~~express the intentions of the City Council with regard to~~ establish a small and local vendor business preference program for goods, services, and consultant contracts. This program is intended to provide a race and gender-neutral tool to expand opportunities for, and develop the capacity of, small and local firms so that all segments of the community will be able to participate in City contracts.

The program is intended as a companion program to Chapter 2, Article 2, Division 36 of the San Diego Municipal Code relating to a Small and Local Business Program for Public Works Contracts.

DEFINITIONS:

Defined terms used in this Council Policy appear in italics. For purposes of this Council Policy:

Consultant shall have the same meaning set forth in Municipal Code section 22.3003.

Contract shall have the same meaning set forth in Municipal Code section 22.3003.

Contract for Goods shall have the same meaning set forth in Municipal Code section 22.3003.

Contract for Services shall have the same meaning set forth in Municipal Code section 22.3003.

Emerging Business Enterprise or *EBE* means a business whose gross annual receipts do not exceed the amount set by the City Manager, and which meets all other criteria set forth in regulations implementing this program. The City Manager shall review the threshold amount for *EBEs* on an annual basis, and adjust as necessary to reflect changes in the marketplace.

Emerging Local Business Enterprise or *ELBE* means a *Local Business Enterprise* that is also an *Emerging Business Enterprise*.

Goods shall have the same meaning set forth in Municipal Code section 22.3003.

Local Business Enterprise or *LBE* means a business that has both a *principle place of business* and *significant employee presence* in the County of San Diego, and that has been in operation for twelve (12) consecutive months.

Principle Place of Business means a location where a business maintains a physical office and through which it obtains no less than fifty percent of its gross annual receipts.

Services shall have the same meaning set forth in Municipal Code section 22.3003.

Significant Employee Presence means no less than twenty-five percent of a business's total number of employees.

Small Business Enterprise or *SBE* means a business whose gross annual receipts do not exceed the amount set by the City Manager, and which meets all other criteria set forth in regulations implementing this program. The City Manager shall review the threshold amount for *SBEs* on an annual basis, and adjust as necessary to reflect changes in the marketplace. A business certified as a *Disabled Veteran Business Enterprise* by the State of California, and that has provided proof of such certification to the City Manager, shall be deemed to be an *SBE*.

Small Local Business Enterprise or *SLBE* means a *Local Business Enterprise* that is also a *Small Business Enterprise*.

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.

1. Goods and Services Contracts

All contracts for goods and contracts for services shall comply with the advertising, bidding and award requirements set forth in San Diego Municipal Code Chapter 2, Article 2, Divisions 30 and 32. In addition, the City Manager shall:

- a. Apply a bid discount in the way of: (1) 2% discount off the bid price for SLBE or ELBE prime contractors; or (2) a discount off the bid price equal to the percentage of SLBE or ELBE subcontractor participation not to exceed 2% of the total bid price. The discount will not apply if an award to the discounted bidder would result in a total contract cost of \$10,000 in excess of the low, non-discounted bid. In the event of a tie bid between a discounted bidder and non-discounted bidder, the discounted bidder will be awarded the contract.
- b. Include a voluntary subcontractor participation requirement of 20% of the total bid or proposal price for SLBEs or ELBEs. For the purposes of this Council Policy, the voluntary subcontractor requirement may be met by a provider of materials or supplies.

2. Consultant Contracts

All consultant contracts shall comply with the advertising, bidding and award requirements set forth in San Diego Municipal Code Chapter 2, Article 2, Divisions 30 and 32, Council Policy 300-7 (Consultant Services Selection) and Administrative Regulations 25.60 (Selection of Consultants for Work Requiring Licensed Architect and Engineering Skills) and 25.70 (Hiring of Consultants Other Than Architects and Engineers), as applicable. In addition, the City Manager shall:

- a. For proposals meeting minimum RFP requirements, apply a maximum of 12 additional points for SLBE or ELBE participation. Points will be awarded as follows:
 1. 20% participation – 5 points
 2. 25% participation – 10 points
 3. SLBE or ELBE as prime contractor – 12 points

- b. For all consultant contracts over \$50,000, include a voluntary subconsultant or subcontractor participation requirement of 20% for SLBEs or ELBEs. For the purposes of this Council Policy, the subcontractor requirement may be met by a provider of materials or supplies.

3. Request for Bid and Request for Proposal Requirements

All Requests for Bid [RFB] and Requests for Proposals [RFP] for City contracts shall require bidders/proposers to address their commitment to diversity. The Purchasing Agent, in consultation with Equal Opportunity Contracting, shall develop RFB and RFP requirements to carry out the intent of this section. RFBs and RFPs may require that bidders/proposers describe their diversity policies, outreach and recruitment efforts, and other programs. However, nothing in this Council Policy shall be construed to permit the City to consider the race or gender of a bidder/proposer, or its employees, in awarding a contract.

4. Bonding and Insurance

The Purchasing Agent, in consultation with Equal Opportunity Contracting, may on a contract-by-contract basis, adjust bonding and insurance requirements on contracts to enhance opportunities for SLBEs and ELBEs to the extent permitted by law. The Purchasing Agent and Equal Opportunity Contracting shall consult with the Risk Management Department before making any such adjustment on a particular contract to ensure that the City is adequately protected against liability.

5. Annual Reporting

The City Manager shall report annually to the City Council on the impact and costs of implementing the Small and Local Business Preference for goods, services and consultant contracts.

HISTORY:

Adopted by Resolution R-260805 05/29/1984

Amended and Retitled by Resolution 11/ /09