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August 24, 2015

### REPORT TO THE ECONOMIC DEVELOPMENT AND INTERGOVERNMENTAL RELATIONS COMMITTEE

#### PROPOSED REVISIONS TO COUNCIL POLICY 100-10

### INTRODUCTION

Council Policy 100-10 (CP 100-10) establishes a preference program for Small and Local Business Enterprises and Emerging Local Business Enterprises (SLBE/ELBE) for goods, services, and consultant contracts.<sup>1</sup> The purpose of CP 100-10 is to provide a race and gender-neutral tool to expand opportunities for SLBEs/ELBEs to ensure that all segments of the community participate in City contracts.

On June 26, 2015, this Office received proposed revisions to CP 100-10 from the Purchasing and Contracting Department (P&C). P&C's proposed revisions update definitions, increase the bid discount for Invitations to Bid from 2% to 5%, add a maximum of 12 additional percentage points to a bidder's total evaluation score for Requests for Proposals, and authorize contract termination and debarment for Contractors who fail to maintain SLBE/ELBE participation levels. City staff presented these revisions to the Economic Development and Intergovernmental Relations Committee (Committee) on July 23, 2015. This Report provides additional legal guidance to City staff and the Committee concerning information that should be reviewed when amending or enacting preference programs. This information must also be presented to the full Council before the revisions to CP 100-10 are adopted.

### DISCUSSION

This Office previously analyzed the legality and factual requirements for revising the public works SLBE/ELBE program.<sup>2</sup> 2012 City Att'y MS 753 (2012-5; Feb. 27, 2012). We advised that a court would apply a rational basis review to determine the legality of proposed revisions to the SLBE/ELBE program. *Id.* citing *Associated General Contractors of California*,

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<sup>1</sup> The City Council adopted CP 100-10 in 1984 to provide a discretionary bid discount for local businesses equal to the amount of sales tax returned to the City. In 2010, the City Council revised CP 100-10 to include consultants and to provide, among other changes, a 2% bid discount for SLBEs/ELBEs bidding as prime contractors on goods and services contracts over \$50,000, and a voluntary subcontractor requirement of 20% for SLBEs/ELBEs.

<sup>2</sup> CP 100-10 is a companion program to Chapter 2, Article 2, Division 36 of the San Diego Municipal Code which codifies the SLBE/ELBE program for public works contracts.

*Inc. v. City and County of San Francisco*, 813 F.2d 922, 942-44 (9th Cir. 1987).<sup>3</sup> Under the rational basis test, the City must have a legitimate factual basis, not an arbitrary reason, for enacting a particular law or policy. This analysis and legal standard must be used when considering revisions to CP 100-10.

The lead case on preference programs is *Associated General Contractors*. In *Associated General Contractors*, a contractor's association challenged the legality of San Francisco's 5% bid preference to local businesses as a violation of the federal equal protection clause.<sup>4</sup> The Court held that the preference did not violate the equal protection clause because the City had legitimate reasons for its establishment. *Id.* at 943-44. The Court reasoned that San Francisco may "rationally allocate its own funds to ameliorate disadvantages suffered by local businesses, particularly where the city itself creates some of the [competitive] disadvantages." *Id.* at 943. These competitive disadvantages include the "higher administrative costs of doing business with [San Francisco] (e.g. higher taxes, higher rents, higher wages and benefits for labor, higher insurance rates, etc.)." *Id.* The Court noted that the ordinance did not excessively favor local businesses nor did it discriminate against non-resident business. *Id.* Rather, the ordinance served a legitimate governmental interest to encourage businesses to locate and remain in the City. *Id.* The Court found the 5% bid preference "measured and appropriate" but cautioned that "legitimate ends are tainted if they are pursued by illegitimate or excessive means." *Id.*

Thus, under *Associated General Contractors*, the City staff must be able to show a nexus between the desired goal (increasing SLBE/ELBE participation in City contracting) and the method(s) the City will use to achieve that goal (here, discounts and points). Information City staff can present to Council for consideration includes, but is not limited to:

1. The number of procurements that fall within the proposed thresholds;
2. The number of SLBE/ELBE firms qualified to bid on goods, services, and consultant contracts within the proposed thresholds;
3. The administrative costs associated with doing business in the City compared to nonresident businesses (e.g., higher taxes, higher rents, higher wages and benefits for labor, higher insurance rates, etc.);
4. City efforts to encourage outside businesses to relocate to the City;
5. Evidence that the existing bid discount and preference points are too low to make the impact the City was seeking when it amended CP 100-10 in 2010;

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<sup>3</sup> According to Westlaw, this case is abrogated by *Metropolitan Washington Chapter, Associated Builders and Contractors, Inc. v. District of Columbia*, 57 F. Supp. 3d 1 (D.C. Cir. 2014). However, this case supports the rational basis review associated with local business preference programs. *Id.* at 28-29.

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

6. How the public interest is best served by encouraging businesses to locate and remain in San Diego;
7. Public testimony documenting hardships faced by SLBE/ELBE firms; and
8. Any other evidence showing the disadvantages facing San Diego SLBE/ELBE firms.

Including such factual information in the legislative record enables the City to defend a preference program should the program be challenged.

### CONCLUSION

Preference programs that are reasonably related to legitimate governmental interests and are “measured and appropriate,” are defensible so long as the legislative record shows that the City’s goal of better engaging SLBEs/ELBEs will be satisfied if the revisions are adopted. A draft Resolution approving revisions to CP 100-10 is attached for consideration.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Lara E. Easton  
Lara E. Easton  
Deputy City Attorney

LEE:cfq  
RC-2015-3  
Doc. No. 1078581  
Attachment

cc: Marshall Anderson, Policy Advisor, Office of the Mayor  
Ron Villa, Deputy Chief Operating Officer  
Kristina Peralta, Interim Director, Purchasing and Contracting  
Henry Foster III, Program Manager, Equal Opportunity Contracting

RESOLUTION NUMBER R-\_\_\_\_\_

DATE OF FINAL PASSAGE \_\_\_\_\_

A RESOLUTION OF THE COUNCIL OF THE CITY OF  
SAN DIEGO APPROVING REVISIONS TO COUNCIL POLICY  
100-10, SMALL AND LOCAL BUSINESS PREFERENCE FOR  
GOODS, SERVICES, AND CONSULTANT CONTRACTS.

WHEREAS, the City of San Diego expends millions of dollars annually in the procurement of goods, services, and consultants to meet the requirements of various City departments; and

WHEREAS, the City may allocate its funds to alleviate disadvantages suffered by local businesses, particularly where the City itself creates some of the disadvantages; and

WHEREAS, historically, there has been a lack of diversity among City contractors; and

WHEREAS, small and emerging local businesses have faced challenges competing against established businesses with greater resources and capital; and

WHEREAS, based on this evidence, the City finds small and emerging local businesses are at a competitive disadvantage with businesses from other areas because of the higher administrative costs of doing business with the City, such as, higher tax rates, higher rents, higher wages and benefits for labor, and higher insurance rates; and

WHEREAS, the City desires to continue to provide contracting opportunities to a broader cross-section of the community to enhance diversity and increase competition; and

WHEREAS, the City has a compelling interest that it is neither an active nor passive participant in marketplace discrimination, and in stimulating the local economy by providing opportunities for small and emerging local businesses to grow, succeed, and create jobs for the citizens of San Diego; and

WHEREAS, the City Council has heard testimony from City staff and the community, considered statistical evidence presented, and reviewed programs in neighboring jurisdictions in an effort to revise the Council Policy to best achieve 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 Council finds that the bid discount and proposal preference points, as revised, are similar to corrective adjustments found in other jurisdictions, and that such revisions would encourage small and emerging local businesses to locate and remain in San Diego; and

WHEREAS, the City Council declares that the disadvantages faced by small and emerging local businesses can be reduced by providing a bid discount and proposal preference points found in the revisions to Council Policy 100-10; NOW, THEREFORE,

BE IT RESOLVED, by the City Council of the City of San Diego, that the City Council hereby adopts the revisions to Council Policy 100-10 as set forth in Document No.

RR - \_\_\_\_\_ filed in the Office of the City Clerk.

BE IT FURTHER RESOLVED, that the City Clerk is instructed updated the Council Policy Manual to include amended Council Policy 100-10.

APPROVED: JAN I. GOLDSMITH, City Attorney

By \_\_\_\_\_  
Lara E. Easton  
Deputy City Attorney

LEE:cfq  
7/30/2015  
Or.Dept: P&C  
Doc. No.: 1072981

I certify that the foregoing Resolution 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)

\_\_\_\_\_  
KEVIN L. FAULCONER, Mayor

Vetoed: \_\_\_\_\_  
(date)

\_\_\_\_\_  
KEVIN L. FAULCONER, Mayor