

November 20, 1991

REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

INCREASING PARTICIPATION IN CITY CONTRACTING
OF FIRMS OWNED BY MINORITY WOMEN

It has been requested that my office research the legality of a separate program to benefit minority women-owned business enterprises (MWBES) in San Diego. We initially refer to the opinions and reports of this office dated November 17, 1981, April 18, 1983 and December 7, 1989, which reference Charter section 94 as prohibiting any award to other than the lowest responsible and reliable bidder. Further, "any contract awarded by the City to a contractor who is not the lowest responsible, responsive, and reliable bidder would be unenforceable as a contract entered into in violation of a Charter provision and therefore void." City Attorney Opinion 83-3, dated April 18, 1983, quoting *Miller v. McKinnon*, 20 Cal.2d 83, 88 (1942).

Charter section 94 notwithstanding, it has been noted that the City and County of San Francisco allows a bidding preference to firms owned by minority women. We do not find case law that addresses minority women as a separate group. The cases deal with minority-owned business and women-owned business enterprises.

The following cases illustrate the courts' holdings on gender-conscious programs. *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), concerned a San Francisco ordinance requiring "set asides," preferences, and goals for MBEs (minority-owned business enterprises), WBEs (women-owned business enterprises) and LBEs (local-owned business enterprises). In its review of the WBE preference, the court of appeal applied a mid-level of review to the city's WBE preferences. Although the court found "the city's WBE preference troubling," *Id.* at 941, it nevertheless held that "the WBE program is . . . substantially related to the city's important goal of compensating women for the disparate treatment they have suffered in the marketplace." *Emphasis in original.* *Id.* at 942, quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

The particular ordinance that was the subject of the first *Associated General Contractors*, expired in 1989 and a new ordinance was enacted. The court in the second *Associated General Contractors of California v. City and County of San Francisco*, 748 F. Supp. 1443, 1446 (N.D. Cal. 1990), stated

The 1989 Ordinance does not set aside any amount of city contract

dollars for minority or women owned enterprises. Rather, its remedial focus is "bid preferences" for prime contractors It provides a five percent bid preference for LBEs and a ten percent bid preference for . . . WBEs . . . representing a 5 percent locality preference plus a 5 percent preference based on . . . WBE status. Emphasis in original.

The WBE provisions of that ordinance have not been challenged.

In *Coral Construction Company v. King County*, 941 F.2d 910 (9th Cir. 1991), King County, Washington implemented a program establishing a preference for MBEs and WBEs in 1981, and amended it in 1989 to comply with the U. S. Supreme Court's decision in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). The court used an intermediate level of scrutiny in upholding a gender-based program, rather than the strict scrutiny required in racial classifications analysis. See *City of Richmond v. Croson*, 488 U.S. at 493. The court in *Coral Construction*, 941 F.2d at 931, held that "under intermediate scrutiny, a gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective." Further, "some degree of discrimination must have occurred in a particular field before a gender-specific remedy may be instituted in that field." *Id.* at 932. In response to an industry-specific challenge, the court also found that "the record adequately indicates discrimination against women in the King County construction industry. Particularly telling is the twenty-two page affidavit of Anne C. Symonds, president of the consulting engineering firm of Anne Symonds & Associates, Inc." *Id.* at 933.

The level of scrutiny for gender-based programs is more moderate than that of the strict scrutiny required of racial classifications; hence, gender-based preferences have been upheld in the two cases noted above. However, it is important to remember that these cases come from cities and counties that do not have a strict charter requirement of lowest responsible and reliable bidder. (San Francisco's charter requires letting of contracts to lowest bidder only in projects of ten million dollars or more.)

CONCLUSION

Contractual preferences based on gender classifications are not permitted under the existing San Diego City Charter. The constitutionality of any amendment establishing WBE preferences would depend on the specific governmental purpose for such a preference. If the Charter were amended, the language may or may not present constitutional infirmities dependent on *Croson* considerations. However, courts have not relaxed the level of scrutiny for racial classifications, so the strict scrutiny analysis, as well as the past discrimination requirements of *Croson*, would undoubtedly come into play for any woman minority classification.

Respectfully submitted,
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