

March 12, 1992

REPORT TO THE COMMITTEE
ON PUBLIC SERVICES AND SAFETY

DRAFT LANGUAGE TO CHANGE THE SAN DIEGO CITY CHARTER
TO ALLOW A POLICY FOR BID PREFERENCES FOR LOCAL CONTRACTORS

At its February 19, 1992, meeting, the Committee on Public Services and Safety requested the City Attorney draft language to change the San Diego City Charter to allow a policy for bid preferences for local contractors doing business with The City of San Diego. Attached is a draft copy of the Charter section we have prepared in response to the Committee's request. Please be aware that the proposed Charter section embodies specific policies and procedures which are necessary in order for the section to withstand constitutional challenge.

In *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), the Ninth Circuit Court of Appeals held that a City of San Francisco ordinance giving preferences to locally owned businesses was facially valid under the Equal Protection Clause of the United States Constitution. The ruling however was both narrow and explicit. Prior to enacting the ordinance in 1984, San Francisco conducted extensive hearings into the City's contracting practices. Specifically, the hearings examined whether its practices historically discriminated against minority-owned/women-owned businesses ("MBE/WBE's"), and whether its practices resulted in placing local business enterprises ("LBE's") at a competitive disadvantage. In separate rulings not discussed herein, the court invalidated the MBE preference and held the WBE preference to be facially valid.

The LBE preference law withstood constitutional challenge because the hearings produced evidence that

local businesses which seek to enter into contracts with the City and County of San Francisco are at a competitive disadvantage with businesses from other areas because of the higher administrative costs of doing business in the city (higher wages and benefits for labor, higher insurance rates, etc.).

Id. at 943. (Quoting San Francisco Ordinance section 12D.2(4).)

Moreover, the court noted that the bid preference law was "an attempt to remove or to lighten a burden San Francisco businesses must bear that is not shared by others" and is not "a burden imposed 'discriminatorily on nonresident corporations solely because they are nonresidents.'" Id. The court also recognized that the means used to remedy the disadvantages suffered by San Francisco businesses was not excessive, particularly since the City of San Francisco itself created some of the disadvantages; the bid preference was slight (five percent (5%)); there were no goals, quotas, or set-asides; and the preference applied only to city contracts. Associated General Contractors of California, 813 F.2d at 943. Similarly, the proposed Charter section provides a slight preference; does not establish goals, quotas, or set-asides; and applies only to San Diego City contracts.

In order for the proposed Charter section to withstand constitutional challenge, The City of San Diego must hold similar fact-finding hearings in order to enact a facially valid bid preference law for local business enterprises. These hearings must establish that local business enterprises are at a competitive disadvantage due to the high cost of doing business in the community. Furthermore, it must be shown, at least to some extent, that this higher administrative cost is caused by the City.

We do note that studies normally produced at such hearings are costly. For similar studies, costs have been estimated as high as six hundred thousand dollars (\$600,000). See, Halligan, *Minority Business Enterprises and Ad Hoc Hypothesis: Guidelines for Studies by Local Governments*, 23:2 *The Urban Lawyer* 249, 250 n.3 (1991).

Finally, the Council should be aware that the proposed draft does not define the term "local business enterprise." It is the intent of our office that this term be defined at a later time after further Council direction. We would note, however, that the Ninth Circuit placed particular importance on the broad definition this term was given by the San Francisco ordinance, opining that according to the definition "any business willing to share some of the burden of a San Francisco location . . . could enjoy the benefits of the LBE preference." Id. at 943-944. Thus, it is imperative that a broad definition of local business enterprise be drafted in order that the legitimate ends of the Charter section not be tainted by illegitimate or excessive means. Id. at 943.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachment
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