April 20, 1992

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LOCAL PREFERENCE POLICY IN PUBLIC CONTRACTS

On March 26, 1992, the Council requested a report from the City Attorney regarding the enactment of a local preference policy. Specifically, the Council directed our office to draft ordinance language which would define local business enterprise ("LBE") and establish a tiering system which would give advantages to local, minority and women-owned business enterprises ("M/WBE's").

ANALYSIS

We have attached for your reference prior opinions drafted by our office regarding LBE and M/WBE preference laws. As we have previously opined, in order for an LBE or M/WBE Charter section or municipal ordinance to withstand constitutional challenge, the City of San Diego must conduct fact-finding hearings. The purpose of these hearings is two-fold. First, it must be determined whether LBE's have been at a competitive disadvantage in bidding on City contracts due to the high cost of doing business in the City. Additionally, the hearings would have to examine whether this higher administrative cost of doing business in San Diego is caused, to some extent, by the City. Second, the hearings must examine whether the City has discriminated in the past against M/WBE's in the award of City contracts. Specific criteria must be established in order for the City to enact a constitutionally valid M/WBE preference program. Inasmuch as the law to be changed (San Diego City Charter sections 35 and 94) is racially and sexually neutral on its face, these findings may not merely demonstrate that discrimination in the market place has generally occurred, or that one group has been impacted economically more than another. Rather, the findings must show that the City has, in the past, applied the law with a racially or sexually discriminatory purpose. Washington v. Davis, 426 U.S. 229 (1976).

The Council must be aware of the exacting scrutiny courts employ in examining the adequacy of such hearings. As we previously have indicated (see, City Attorney Opinion No. 84-4), failure to conduct adequate hearings and to narrowly tailor a program to the identified discrimination, will result in the court finding that the program

violates the equal protection clauses of the United States and California Constitutions. See, University of California v. Baake, 438 U.S. 265 (1978); Dept. of General Services v. Superior Court, 85 Cal. App. 3d 273 (1978); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); and, Associated General Contractors v. City and County of San Francisco, 813 F.2d 922 (1987).

The disparity studies and hearings referenced above must be conducted prior to the adoption of any municipal ordinance establishing preferences for LBE's and M/WBE's. Moreover, these hearings are essential to the establishment of any percentages and to any definition of "Local Business Enterprise." In other words, the disadvantages must be determined before they can be defined, and the ordinance language must be narrowly tailored to redress the prior disadvantages and past discrimination identified by the studies and hearings. Croson, 488 U.S. 469 (1989).

CONCLUSION

Given the foregoing, we have revised the draft copy of the Charter section we previously proposed to the Charter Review Commission in 1989. This revised draft is attached for your consideration. The proposed Charter section permits the City to consider the adoption by ordinance of an LBE and M/WBE preference program. It further allows the City to conduct fact-finding hearings prior to the adoption of any ordinance implementing LBE, M/WBE preferences on City contracts. The Council must adopt the ordinance calling for the November 1992 election by July 27, 1992. If the Council desires, this ordinance may include a proposition with the proposed Charter section.

Respectfully submitted,
JOHN W. WITT
City Attorney

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Attachments (6)
RC-92-32