

January 5, 1995
REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

EQUAL EMPLOYMENT OPPORTUNITY ORDINANCE

By Resolution No. R-284513, adopted by Council on August 9, 1994, the Mayor and Council directed the Equal Opportunity Contracting Program ("EOCP") and the City Attorney to draft an Equal Employment Opportunity Ordinance.

Pursuant to Council direction, the EOCP and the City Attorney drafted the ordinance, a copy of which is attached to City Manager's Report 94-402. The ordinance provides for a mandatory nondiscrimination clause in all City contracts. It further provides for analysis by the EOCP of a contractor's work force and submittal of an Equal Employment Opportunity Plan when warranted. Finally, the ordinance provides for an appeal process if penalties for failure to submit the required documentation or failure to comply with the Equal Employment Opportunity Plan are imposed.

We believe the ordinance addresses the concerns of the Council regarding the City's commitment to equal employment opportunity for all individuals. The ordinance empowers the City to ensure equal opportunity in hiring and promotions for all individuals in all contracts let by the City which entail an expenditure of City funds.

We also believe that the ordinance reflects the current state of the law. However, any statute or ordinance regarding affirmative action or equal opportunity will, if challenged, face close scrutiny in the courts. A number of recent cases indicate that even the best efforts to avoid constitutional infirmities in this area may not be successful. See, *Aiken et al. v. The City of Memphis*, 37 F.3d 1155 (6th Cir. 1994). *Podberesky v. University of Maryland*, 38 F.3d 143 (4th Cir. 1994), and *Concrete Works of Colorado v. Denver, City and County*, 36 F.3d 1513 (10th Cir. rehearing denied (1994)).

Additionally, currently pending before the U.S. Supreme Court is the case of *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537 (10th Cir. 1994). This case concerns a constitutional challenge to the federal government's Disadvantaged Business Enterprise Program and could be the vehicle for the Court to

redefine the law concerning this sensitive and complex issue.

The California courts have also been active in this area. On December 28, 1994, the California Supreme Court in the case of *Domar v. The County of Los Angeles*, 94 DAR 18217 (1994), gave charter cities great leeway, consistent with their own charters, to impose equal opportunity requirements on bidders as part of bid specifications. Although the City of Los Angeles' charter contains different language than the City of San Diego's charter, we believe that, in general, this opinion supports the validity of the Equal Opportunity Ordinance. Unfortunately, that case has been remanded to the lower court to resolve other constitutional issues. We are pleased to have joined other cities in supporting the position of the City of Los Angeles in this case.

We bring these cases to your attention so that the Mayor and Council may be aware that the Equal Employment Opportunity Ordinance may be subject to amendment, or possibly repeal, based upon the outcome of these court decisions or any other future litigation.

Respectfully submitted,
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City Attorney

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