

(O-2000-143)
(CORRECTED COPY)

18785

ORDINANCE NUMBER O-_____ (NEW SERIES)

ADOPTED ON APR 10 2000

AN ORDINANCE AMENDING CHAPTER II, ARTICLE 2 OF THE SAN DIEGO MUNICIPAL CODE BY ADDING DIVISION 35, SECTIONS 22.3501, 22.3502, 22.3503, 22.3504, 22.3505, 22.3506, 22.3507, 22.3508, 22.3509, 22.3510, 22.3511, 22.3512, 22.3513, 22.3514, 22.3515, 22.3516 AND 22.3517, ESTABLISHING A NONDISCRIMINATION POLICY AND COMPLAINT PROCESS FOR BUSINESS FIRMS THAT DO BUSINESS WITH THE CITY OF SAN DIEGO.

WHEREAS, the Council of the City of San Diego is concerned with the results of the City's Disparity Study that disclosed discrimination by contractors bidding for and working on City projects against subcontractors, suppliers, and vendors owned by minority, female, or disabled persons; and

WHEREAS, it is the intent of the Council of the City of San Diego to establish a clear policy against discrimination in business on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability and a clear policy for the City not to engage in business with firms that discriminate in their solicitation, selection, or treatment of vendors, suppliers, and subcontractors; and

WHEREAS, a nondiscrimination policy approach has been favorably commented on by the United States Supreme Court in *City of Richmond v. Croson*, 488 U.S. 469, 509-510 (1989) and by other federal courts; and

WHEREAS, the City of San Diego has a constitutional duty to ensure that the tax dollars collected from its citizens do not serve to finance and reward private prejudice on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination; and

WHEREAS, it is in the best interests of the City to enhance competition on City projects by promoting equal opportunity and the full participation of all segments of the community in a marketplace environment that is free from the effects of discrimination; and

WHEREAS, the City is likely to benefit from a marketplace that is open and free from the effects of discrimination through lower prices and higher revenues; and

WHEREAS, it is the intent of the Council of the City of San Diego in enacting this ordinance to provide a formal mechanism for receiving, investigating, and resolving complaints of discrimination filed against businesses that have submitted a bid or proposal for, have been selected to engage in, or are engaged in doing business with the City; and

WHEREAS, it is the further intent of Council in enacting this ordinance to give fuller meaning and effect to the goals and objectives of this policy by including enforcement provisions that may subject violators of the nondiscrimination policy to possible contract termination, debarment from participation in City projects, or other remedial actions;

NOW, THEREFORE,

BE IT ORDAINED, by the Council of the City of San Diego, as follows:

Section 1. That Chapter II, Article 2 of the San Diego Municipal Code is hereby amended by adding Division 35, Sections 22.3501, 22.3502, 22.3503, 22.3504, 22.3505, 22.3506, 22.3507, 22.3508, 22.3509, 22.3510, 22.3511, 22.3512, 22.3513, 22.3514, 22.3515, 22.3516, and 22.3517 to read as follows:

DIVISION 35

Nondiscrimination In Contracting

SEC. 22.3501 Purpose and Intent

This Division is intended to further the *City's* policy not to engage in business with *business firms* that discriminate in the solicitation, selection, hiring, or treatment of subcontractors, vendors, or suppliers on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability by providing a procedure for receiving, investigating, and resolving complaints of *discrimination* filed against *business firms* that have submitted a bid or proposal for, have been selected to engage in, or are engaged in doing business with the *City*.

SEC. 22.3502 Definitions

All terms defined in this Division appear in italics. For purposes of this Division:

Appeals Officer means an individual appointed by the City Manager to conduct hearings on appeals of decisions issued by the *Hearing Officer*.

Business firm means any *person*, firm, partnership, corporation, or other business entity or combination thereof, including any *financial institution*, prime contractor, subcontractor, supplier, or vendor, that has submitted a bid or

proposal, has been selected to do business, or is doing business with the *City*, including selling or leasing supplies, or goods, or providing construction, financial, professional, or other services, for a fee.

City means the City of San Diego and those agencies, boards, commissions, and corporations authorized to act on behalf of, or as agent for, the City of San Diego.

Contract means an agreement with any *person* let by or on behalf of the *City* for that *person* to provide labor, materials, goods, supplies, or services.

Director means the Deputy Director responsible for the *Program*, or his or her representative.

Discrimination means any disadvantage, difference, distinction, or preference in the solicitation, selection, hiring, or treatment of a *business firm* because of the race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination regarding the characteristics of its employees or owners.

Financial institution means any *person* or entity engaged in the business of lending money, guaranteeing loans, extending credit, securing bonds, providing venture or equity capital, or that offers financial services in connection with *City* projects. *Financial institution* includes banks, savings and loans, venture capital companies, insurance companies, bonding companies, mortgage companies, credit unions, and brokers.

Hearing Officer means an individual appointed by the City Manager to conduct hearings under this Division.

Person has the same meaning as in Municipal Code section 11.0210.

Program means the Equal Opportunity Contracting Program or its successor.

Subcontract means an agreement for the performance of a particular portion of work to be performed under a *contract* with the *City*.

SEC. 22.3503 Scope

This Division applies to all *business firms, contracts, and subcontracts*, but does not apply to *contracts* to which any city (other than the *City*), county, district, or other political subdivision, or any joint powers authority created under authority of law, or other public entity, or any other group or combination of the foregoing acting as a unit, is also a party.

SEC. 22.3504 Nondiscrimination Policy

It is the policy of the City of San Diego not to accept bids or proposals from, nor to engage in business with, any *business firm* that has discriminated on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, disability, or any other form of unlawful discrimination in its solicitation, selection, hiring, or treatment of another business.

SEC. 22.3505 Complaints of Discrimination

Any *person* may file an administrative complaint with the *Director* stating facts showing or tending to show that a *business firm* has engaged in

discrimination against one or more other businesses. Within ten business days, the *Director* shall notify the *business firm* against whom the complaint was filed that a complaint has been received.

SEC. 22.3506 Investigation of Complaints

The *Program's* investigative unit shall review and investigate *discrimination* complaints filed under this Division.

SEC. 22.3507 Initial Findings and Recommendations

Based upon the investigative unit's review and investigation, the *Director* shall make an initial non-binding finding of each allegation stated in the complaint, that either:

(a) the investigation produced sufficient evidence to find that the alleged *discrimination* did take place ("sustained");

(b) the investigation failed to produce sufficient evidence to find whether the alleged *discrimination* took place ("not sustained");

(c) the investigation produced sufficient evidence to find that the alleged *discrimination* did not take place ("unfounded");

(d) the investigation produced sufficient evidence to establish that the complainant knowingly made one or more false or frivolous allegations ("false or frivolous");

(e) the allegation has been settled or otherwise resolved with the agreement of the interested parties; or

(f) the allegation has been withdrawn.

The *Director* shall recommend to the City Manager, or his or her representative appropriate action to be taken. That action may include additional investigation of the complaint, sanctions, remedies or other action consistent with this Division. The initial non-binding findings and recommendations shall be made by the *Director* within 120 calendar days of receipt of the complaint. The City Manager may extend this time limit at the request of the *Director* and for good cause or if the parties agree to mediate the complaint pursuant to Division 11, Article 2 of Chapter I. The *Director* shall notify the complainant and the *business firm* within five business days of the initial findings and recommendations, including an explanation of the reasons justifying the initial findings.

SEC. 22.3508 Hearings

(a) If the *Director* determines that one or more allegations are sustained, the *business firm* against whom the allegations were made shall be entitled to an administrative hearing on the allegations and an opportunity to participate in the administrative hearing. The *business firm* must request an administrative hearing within fifteen calendar days of notice of the initial findings. The hearing shall be held before a *Hearing Officer* within sixty calendar days of issuance of the *Director's* initial findings.

(b) Based upon the evidence presented at the administrative hearing, and within thirty calendar days of the hearing, the *Hearing Officer* may affirm or reject the initial findings and recommendations, may substitute different findings

and order appropriate remedies, or may return the case to the *Director* for further investigation and findings.

(c) Except where they conflict with this Division or the rules and regulations established by the City Manager pursuant to this Division, the hearing shall be conducted pursuant to the administrative enforcement hearing procedures set forth in Division 4, Article 2 of Chapter I.

SEC. 22.3509 Remedies

When a complaint is sustained, the *Hearing Officer* shall order any one or more of the following actions:

(a) Any remedy provided by law or agreed to by the *business firm*;

(b) Recommendation to the City Manager and City Attorney for debarment of the *business firm* from bidding and contract awards on City projects for a period of not more than three years, according to the procedures set forth in Division 8, Article 2 of Chapter II;

(c) Suspension or termination of any current *contract* between the *business firm* and the *City*; or,

(d) Referral of the matter for criminal prosecution, if appropriate under the circumstances.

SEC. 22.3510 Sanctions For The Filing Of A False or Frivolous Complaint

If the *Director* determines that one or more allegations of a complaint are false and that the complainant knew them to be false when filed, or that one or more of the allegations of a complaint are so frivolous that they are wholly

without merit, the *Director* may refuse to review or investigate any complaint filed under this Division by the same complainant for a period of up to three years. The *Director* may also recommend monetary sanctions against the complainant in the amount of the costs incurred by the *City* for the investigation and review of the false or frivolous complaint.

SEC. 22.3511 Appeals

A *business firm* against whom a complaint has been filed or a complainant may appeal the decision of the *Hearing Officer* by filing a request for an appeal in writing with the City Manager within ten calendar days from service of the notice of the decision. The City Manager, or his or her representative, shall within ten calendar days of receipt, grant or deny the request for an appeal. If the request for an appeal is denied, the *Hearing Officer's* decision shall be the final administrative decision. If the request for an appeal is granted, the City Manager shall designate an *Appeals Officer* to hear the appeal. The appeal shall be heard and the *Appeals Officer* shall render a final administrative decision within forty-five calendar days of granting the request for an appeal. Except where they conflict with this Division or the rules and regulations established by the City Manager pursuant to this Division, the appeal hearing shall be conducted pursuant to the administrative enforcement hearing procedures set forth in Division 4, Article 2 of Chapter I.

SEC. 22.3512 Mandatory Nondiscrimination Contract Clause

Every *contract* and *subcontract* shall contain a nondiscrimination clause that reads as follows:

Contractor shall not discriminate on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring, or treatment of subcontractors, vendors, or suppliers. Contractor shall provide equal opportunity for subcontractors to participate in subcontracting opportunities. Contractor understands and agrees that violation of this clause shall be considered a material breach of the contract and may result in contract termination, debarment, or other sanctions.

SEC. 22.3513 Contractor Bid Requirements

All requests for bids or proposals issued by the *City* shall include the following language:

As part of its bid or proposal, Bidder shall provide to the City a list of all instances within the past ten years where a complaint was filed or pending against Bidder in a legal or administrative proceeding alleging that Bidder discriminated against its employees, subcontractors, vendors, or suppliers, and a description of the status or resolution of that complaint, including any remedial action taken.

SEC. 22.3514 Contract Disclosure Requirements

Every *contract* issued by the *City* shall include the following language:

Upon the City's request, Contractor agrees to provide to the City, within sixty calendar days, a truthful and complete list of the names of all subcontractors, vendors, and suppliers that Contractor has used in the past five years on any of its contracts that were undertaken within San Diego County, including the total dollar amount paid by Contractor for each subcontract or supply contract. Contractor further agrees to fully cooperate in any investigation conducted by the City pursuant to the City's Nondiscrimination in Contracting Ordinance. Contractor understands and agrees that violation of this clause shall be considered a material breach of the contract and may result in contract termination, debarment, and other sanctions.

SEC. 22.3515 Other Legal Remedies

The remedies provided by this section are in addition to any other statutory, legal, or equitable remedies that may be available and are not intended to be exclusive.

SEC. 22.3516 Non-Interruption of Performance

The filing, investigation, hearing, and appeal of a complaint under this Division shall not hinder or affect the award of, performance of, or payment on a *contract* prior to a final administrative decision that establishes a violation.


SEC. 22.3517 Policies and Procedures

The City Manager shall establish such rules and regulations as may be necessary to implement this Division.

Section 2. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 3. This Ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: CASEY GWINN, City Attorney

By 
Carrie L. Gleeson
Deputy City Attorney

CLG:pev:ms
02/23/2000
06/06/00 (Corrected)
Or.Dept: PS&NS
O-2000-143

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DIVISION 35

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City means the City of San Diego and those agencies, boards, commissions, and corporations authorized to act on behalf of, or as agent for, the City of San Diego.

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The *Director* shall recommend to the City Manager, or his or her representative appropriate action to be taken. That action may include additional investigation of the complaint, sanctions, remedies or other action consistent with this Division. The initial non-binding findings and recommendations shall be made by the *Director* within 120 calendar days of receipt of the complaint. The City Manager may extend this time limit at the request of the *Director* and for

good cause or if the parties agree to mediate the complaint pursuant to Division 1.1, Article 2 of Chapter I. The *Director* shall notify the complainant and the *business firm* within five business days of the initial findings and recommendations, including an explanation of the reasons justifying the initial findings.

SEC. 22.3508 Hearings

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(b) Based upon the evidence presented at the administrative hearing, and within thirty calendar days of the hearing, the *Hearing Officer* may affirm or reject the initial findings and recommendations; may substitute different findings and order appropriate remedies; or may return the case to the *Director* for further investigation and findings.

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Contractor further agrees to fully cooperate in any investigation conducted by the City pursuant to the City's Nondiscrimination in Contracting Ordinance.

Contractor understands and agrees that violation of this clause shall be considered a material breach of the contract and may result in contract termination, debarment, and other sanctions.

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