

ORDINANCE NUMBER O- 19922 (NEW SERIES)

FEB 04 2010

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 2, DIVISION 30 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 22. 3002, RELATING TO CONTRACT DEFINITIONS, COMPETITIVE BIDDING PROCEDURES, AND CONTRACT ALTERATIONS; AND AMENDING CHAPTER 2, ARTICLE 2, DIVISION 36, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 22.3601, 22.3602, 22.3603, 22.3604, 22.3605, AND 22.3606; REPEALING SECTION 22.3607, AND AMENDING AND RENUMBERING SECTION 22.3608 TO SECTION 22.3607; ADDING NEW SECTION 22.3608 TITLED "APPEALS"; REPEALING SECTION 22.3609, AND ADDING NEW SECTION 22.3609 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED AT \$1,000,000 AND OVER"; AMENDING AND RENUMBERING SECTION 22.3610 TO 22.3611, AND ADDING NEW SECTION 22.3610 TITLED "SOLICITATION OF BIDS FOR AND AWARD OF MAJOR PUBLIC WORKS CONTRACTS VALUED MORE THAN \$500,000 BUT LESS THAN \$1,000,000"; REPEALING SECTION 22.3612, AND AMENDING AND RENUMBERING SECTION 22.3611 TO SECTION 22.3612; AMENDING SECTIONS 22.3613, 22.3614 AND 22.3615; AMENDING AND RENUMBERING SECTION 22.3616 TO SECTION 22.3621, AND ADDING NEW SECTIONS 22.3616, 22.3617, 22.3618, 22.3619, 22.3620 AND 22.3622, ALL RELATING TO A SMALL AND LOCAL BUSINESS PROGRAM FOR PUBLIC WORKS CONTRACTS.

WHEREAS, the City of San Diego desires to provide contracting opportunities to a broad cross-section of the community in order to enhance diversity and increase competition in City contracts; and

WHEREAS, the City of San Diego has a compelling interest in ensuring that it is neither an active nor passive participant in marketplace discrimination; and

WHEREAS, the City of San Diego also has a compelling interest in stimulating the local economy by providing opportunities for small and local businesses to grow, succeed and create jobs; and

WHEREAS, the City Council has heard testimony from City staff and the community, considered statistical evidence, and reviewed programs in neighboring jurisdictions, in an effort to identify a program best-suited to achieve these goals; and

WHEREAS, the City Council declares that a small and local business preference program would provide an effective, race and gender-neutral tool for achieving the City's goals of enhancing diversity in City contracts, ensuring open and fair competition, and promoting a robust local economy; and

WHEREAS, the City Charter section 94 authorizes the City Council to set a dollar amount under which the City is not required to award public works contracts to the lowest responsible and reliable bidder; NOW, THEREFORE,

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

Section 1. That Chapter 2, Article 2, Division 30 of the San Diego Municipal Code is amended by amending Sections 22.3003, to read as follows:

Article 2: Administrative Code

Division 30: Contract Definitions, Competitive Bidding Procedures, and Contract Alterations

§ 22.3003 Definitions

Terms defined in Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36 are indicated by italics. For purposes of Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 35, and 36:

Agency through Maintenance Contracts [No change in text.]

Major public works contract means a *public works contract* valued at more than \$500,000.

Minor public works contract means a *public works contract* valued at less than \$500,000.

Person through Valued at [No change in text.]

Section 2. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending Sections 22.3601, 22.3602, 22.3603, 22.3604, 22.3605 and 22.3606, to read as follows:

Article 2: Administrative Code

Division 36: Small and Local Business Program for Public Works Contracts

§ 22.3601 Purpose

The City Council wants to create programs intended to enhance diversity in City contracts, increase competition, and stimulate the local economy by providing opportunities to small and local businesses. In addition, the City has a compelling interest in ensuring that it is neither an active nor passive participant in marketplace discrimination, and in promoting equal opportunity for all segments of the contracting community. This Division, therefore, establishes a small and local business program for *public works contracts*, which includes: (1) small and

local business bid preferences and mandatory subcontractor participation requirements for *major public works*, and (2) a sheltered competition program for *minor public works*. This program is intended to provide a race and gender-neutral tool to expand opportunities for, and develop the capacity of, small and local firms so that all segments of the community may participate in City *contracts*.

§ 22.3602 Applicability

This Division applies to all *public works contracts* except for *contracts* that are not “municipal affairs” under article II, section 5 of the California Constitution.

§ 22.3603 Definitions

Defined terms used in this Division appear in italics. For purposes of this Division:

Emerging Business Enterprise or *EBE* means a business whose gross annual receipts do not exceed the amount set by the City Manager, and that meets all other criteria set forth in regulations implementing this Division. The City Manager shall review the threshold amount for *EBEs* on an annual basis, and adjust as necessary to reflect changes in the marketplace.

Emerging Local Business Enterprise or *ELBE* means a *Local Business Enterprise* that is also an *Emerging Business Enterprise*.

Joint Venture means an association of two or more persons or businesses that, pursuant to a written agreement, carry out a single business enterprise for which purpose they combine their capital, efforts, skills, knowledge or property.

Local Business Enterprise or LBE means a business that has both a *principle place of business* and *significant employee presence* in the County of San Diego, and that has been in operation for twelve (12) consecutive months.

Principle Place of Business means a location where a business maintains a physical office and through which it obtains no less than fifty percent of its gross annual receipts.

Protégé shall mean a business that has been approved and is an active participant in the City of San Diego's Mentor-Protégé Program, has signed the required program participation agreement and has been assigned a mentor.

Significant Employee Presence means no less than twenty-five percent of a business's total number of employees.

Small Business Enterprise or SBE means a business whose gross annual receipts do not exceed the amount set by the City Manager, and that meets all other criteria set forth in regulations implementing this Division. The City Manager shall review the threshold amount for *SBEs* on an annual basis, and adjust as necessary to reflect changes in the marketplace. A business certified as a Disabled Veteran Business Enterprise by the State of California, and that has provided proof of such certification to the City Manager, shall be deemed to be an *SBE*.

Small Local Business Enterprise or SLBE means a *Local Business Enterprise* that is also a *Small Business Enterprise*.

§ 22.3604 Determination of Value of a Public Works Contract

- (a) The value of a *public works contract* shall be determined by the City Manager's estimate of the costs of construction. For *Design-Build*

contracts, as defined by Division 33 of this Article, the costs of design shall be included in the City Manager's estimate.

- (b) The City Manager shall estimate a proposed *public works contract's* value prior to commencing contractor selection so that proper procedures may be used to advertise, bid, and award the contract.
- (c) If *minor public works contracts* advertising, bidding, and award procedures are used, the fact that one or more of the bids received exceeds \$500,000 does not render the procedures or award of a *public works contract* invalid. However, if *minor public works contracts* advertising, bidding, and award procedures are used, and all bids exceed \$550,000, the City Manager must reject the bids and commence procedures for *major public works*.

§ 22.3605 Establishment of SLBE and ELBE Lists

- (a) The City Manager shall establish and maintain a list of eligible *SLBEs* and a list of eligible *ELBEs*, for the purposes of awarding *minor public works contracts*.
- (b) The *SLBE* and *ELBE* eligibility lists will include information regarding the licenses held and disciplines of each business on the list.

§ 22.3606 Eligibility for SLBE and ELBE Lists

- (a) Except as provided in Section 22.3606(b), to be eligible to be placed on the appropriate eligibility list, an *SLBE* or *ELBE* shall:
 - (1) be owned by construction professionals licensed by the California Contractors State Licensing Board;

- (2) be owned by construction professionals in good standing with the City of San Diego;
 - (3) have a City of San Diego Business Tax Certificate authorizing it to do business in this City;
 - (4) provide a signed statement of an authorized representative of the business affirming that it meets the eligibility requirements of an *SLBE* or *ELBE* set forth in this Division and implementing regulations. The statement shall be signed under penalty of perjury under California law; and
 - (5) submit a completed application in accordance with procedures established by the City Manager. *Protégés* may submit their Mentor-Protégé application and signed participation agreement in lieu of the application required by this section.
- (b) A business certified as a Minority-owned Business Enterprise, Woman-owned Business Enterprise, or Disadvantaged Business, by any department of the State of California or other public agency recognized by the City of San Diego as a certifying agency is not precluded from becoming eligible as an *SLBE* or *ELBE*. However, such certification does not eliminate the necessity for meeting the requirements for an *SLBE* or *ELBE*.

Section 3. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by repealing Section 22.3607, and amending and renumbering Section 22.3608 to Section 22.3607, to read as follows:

§ 22.3607 Removal and Reinstatement

- (a) The City Manager shall remove an *SLBE* or *ELBE* from the applicable eligibility list:
- (1) two years after approval of the *SLBE*'s or *ELBE*'s application; or
 - (2) immediately, in the event the business has used its status as an *SLBE* or *ELBE* to assist another business in obtaining benefits of this Division to which the other business would not otherwise be entitled, or for any other fraudulent purpose.
- (b) A business that has been removed from an eligibility list under Section 22.3607(a)(1) may be reinstated after establishing that the business qualifies as an *SLBE* or *ELBE* and successfully completes the City Manager's application process for reinstatement.

Section 4. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by adding new Section 22.3608 titled "Appeals," to read as follows:

§ 22.3608 Appeals

A business that has been denied *SLBE* or *ELBE* eligibility, or removed from an eligibility list under Section 22.3607(a)(2), may file an appeal within 15 days of the denial or removal. The City Manager shall establish procedures for the filing, granting and denial of appeals, which shall include the opportunity for a hearing.

Section 5. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by repealing Section 22.3609 and adding new Section 22.3609 titled "Solicitation of Bids for and Award of Major Public Works Contracts Valued at \$1,000,000 and Over," to read as follows:

§ 22.3609 Solicitation of Bids for and Award of Major Public Works Contracts Valued at \$1,000,000 and Over

The City Manager shall, on a project-by-project basis, include a mandatory subcontractor participation requirement for *SLBEs* and/or *ELBEs* for *major public works contracts* valued at \$1,000,000 or more. Bids that do not reach the mandatory subcontractor participation requirement, or demonstrate good faith efforts to do so, will be deemed nonresponsive and ineligible for award. *SLBE* and *ELBE* prime contractors will be deemed to have met the subcontractor participation requirement, provided that the *SLBE* or *ELBE* prime contractor self-performs at least 51 percent of the *public works contract*.

Section 6. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending and renumbering Section 22.3610 to new Section 22.3611, and adding new Section 22.3610 titled “Solicitation of Bids for and Award of Major Public Works Contracts Valued More Than \$500,000 but Less Than \$1,000,000,” to read as follows:

§ 22.3610 Solicitation of Bids for and Award of Major Public Works Contracts Valued at More Than \$500,000 but Less Than \$1,000,000

In addition, the City Manager shall, on a project-by-project basis, do one or both of the following for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000:

- (a) Permit a bid discount of:
 - (1) 5 percent for *SLBE* or *ELBE* prime contractors; or
 - (2) the amount of *SLBE* or *ELBE* subcontractor participation, or the amount of *SLBE* or *ELBE* participation in a City-approved *joint venture*, up to a maximum of 5 percent. The discount will not apply if an award to

the discounted bidder would result in a total contract cost of \$50,000 in excess of the lowest, non-discounted bid. In the event of a tie bid between a discounted bidder and non-discounted bidder, the discounted bidder will be awarded the *public works contract*.

- (b) Include a mandatory subcontractor participation requirement for *SLBEs* or *ELBEs*. Bids that do not reach the mandatory subcontractor participation requirement, or demonstrate good faith efforts to do so, will be deemed nonresponsive and ineligible for award. *SLBE* and *ELBE* prime contractors will be deemed to have met the subcontractor participation requirement, provided that the *SLBE* or *ELBE* prime contractor self-performs at least 51 percent of the *public works contract*.

§ 22.3611 Solicitation of Bids for and Award of Minor Public Works Contracts Valued at More Than \$250,000 but Less Than or Equal to \$500,000

- (a) *Minor public works contracts* valued at more than \$250,000 but less than or equal to \$500,000 shall be awarded through a competitive bid process open only to businesses listed on the *SLBE* or *ELBE* eligibility lists.
- (b) The lowest responsible and reliable *SLBE* or *ELBE* bidder shall be awarded the *public works contract*. If there are no responsible bids, the City Manager shall follow the advertising, bidding, and award procedures for *major public works contracts* valued at more than \$500,000 but less than \$1,000,000 as set forth in Section 22.3610.

- (c) Nothing in this section shall limit the City Manager's right to reject all bids in the event that all bids received exceed the City's projected costs for a particular *public works contract*.

Section 7. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by repealing Section 22.3612, and amending and renumbering Section 22.3611 to Section 22.3612, to read as follows:

§ 22.3612 Solicitation of Bids for and Award of Minor Public Works Contracts Valued at \$250,000 and Under

- (a) *Minor public works contracts valued at \$250,000 or less shall be awarded through a competitive bid process open only to businesses listed on the ELBE eligibility list unless there are no businesses on the ELBE eligibility list that have the requisite licenses for the contract, in which case the competitive bid process will also be open to SLBEs.*
- (b) *The lowest responsible and reliable ELBE bidder shall be awarded the public works contract. If there are no responsible bids, the City Manager shall follow the advertising, bidding, and award procedures for major public works contracts valued at more than \$500,000 but less than \$1,000,000 as set forth in Section 22.3610.*
- (c) Nothing in this section shall limit the City Manager's right to reject all bids in the event that all bids received exceed the City's projected costs for a particular *public works contract*.

Section 8. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending Sections 22.3613, 22.3614 and 22.3615, to read as follows:

§ 22.3613 Plans and Specifications to be Provided Free of Charge to SLBEs or ELBEs

Plans and specifications for *minor public works contracts* will be provided free of cost to *SLBEs* and *ELBEs*.

§ 22.3614 Emergency Contracts

- (a) Based on the City Manager's written determination that an *emergency* exists requiring immediate action, the City Manager may execute a *minor public works contract* valued at \$25,000 to \$75,000 so long as the City Manager has received written quotes for the proposed work from at least two businesses on either the *SLBE* or *ELBE* eligibility lists.
- (b) Based on the City Manager's written determination that an *emergency* exists requiring immediate action, the City Manager may execute a *minor public works contract* valued at less than \$25,000 so long as the City Manager has received written quotes for the proposed work from at least one business on either the *SLBE* or *ELBE* eligibility lists.

§ 22.3615 Effect of Amendments to Minor Public Works Contracts

As long as the original value of a *minor public works contract* as determined at bid opening is less than or equal to \$500,000, any future amendments increasing the value of that *contract* do not render the bidding, award or administration process invalid.

Section 9. That Chapter 2, Article 2, Division 36 of the San Diego Municipal Code is amended by amending and renumbering Section 22.3616 to Section 22.3621, and adding new Sections 22.3616, 22.3617, 22.3618, 22.3619, 22.3620 and 22.3622, to read as follows:

§ 22.3616 Reduction in Subcontracts

All prime contractors shall notify and obtain prior written approval of the City Manager for any reduction in subcontract scope, termination, or substitution of an *SLBE* or *ELBE* subcontractor.

§ 22.3617 Waivers

The intent of this Division is to maximize the opportunity for *SLBE* and *ELBE* prime and subcontractor participation in City *public works contracts*. However, the City Manager may grant written waivers of *SLBE* and *ELBE* bid preferences or subcontractor participation requirements on a project-by-project basis when in the best interests of the City. The City Manager shall establish procedures for granting and documenting waivers, and shall report quarterly to the City Council regarding such waivers.

§ 22.3618 Bonding and Insurance

The City Manager may, on a project-by-project basis, adjust bonding and insurance requirements on *public works contracts* to enhance opportunities for *SLBEs* and *ELBEs* to the extent permitted by law. The City Manager shall consult with the Risk Management Department before making any such adjustment on a particular *public works contract* to ensure that the City is adequately protected against liability.

§ 22.3619 Technical Assistance

The City Manager may establish technical assistance programs to assist *SLBEs* and *ELBEs* in applying for business-type certifications, becoming eligible for *minor public works contracts*, securing necessary bonding and

insurance, and generally complying with the City's advertising, bidding, and award process.

§ 22.3620 Packaging of Public Works Contracts

The City Manager shall meet with relevant City departments on an annual basis to review the percentage of *public works contracts* that qualify as *minor public works contracts*. The City Manager shall make recommendations as necessary regarding the packaging of *public works contracts* to maximize the intent of this Division, where appropriate and to the extent permitted by law.

§ 22.3621 City Manager to Adopt Regulations

The City Manager shall develop and implement administrative policies, rules, and regulations to carry out the intent of this Division.

§ 22.3622 Audit and Reporting Requirements

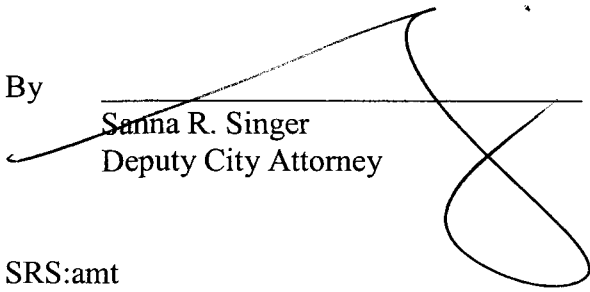
The City Auditor, or some other independent body or auditing firm, shall periodically conduct audits of the Small and Local Business Program for *public works contracts*. The City Manager shall report annually to the City Council regarding the impact and costs of implementing the Small and Local Business Program for *public works contracts*.

Section 10. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been available to the City Council and the public prior to the day of its passage.

Section 11. That this ordinance shall take effect and be in force on July 1, 2010.

APPROVED: JAN I. GOLDSMITH, City Attorney

By



Sanna R. Singer
Deputy City Attorney

SRS:amt
12/22/09
Or.Dept:CityAtty
O-2010-28

I hereby certify that the foregoing Ordinance was passed by the Council of the City of San Diego, at this meeting of JAN 26 2010.

ELIZABETH S. MALAND
City Clerk

By *Sara Richardson*
Deputy City Clerk

Approved: 2.4.10
(date)

JSL
JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor