OPINION NUMBER 97-2

DATE: October 20, 1997 Change if Desired

SUBJECT: Status of the City's Existing and Proposed Equal Opportunity Contracting Program, and Use of the Disparity Study, Under Proposition 209 and Recent Case Law

REQUESTED BY: Councilmember George Stevens, Chair
Members of the Public Safety & Neighborhood Services Committee

PREPARED BY: City Attorney

QUESTIONS PRESENTED

1. What is the effect of Proposition 209 and related case law on the City's existing Equal Employment Opportunity and Equal Opportunity Contracting programs?

2. What may be done with the Disparity Study commissioned by the City Council and completed by City staff, in light of Proposition 209 and existing case law?

SHORT ANSWERS

1. Proposition 209 and related case law eliminate California state and local contracting, employment and education programs that discriminate against or grant any preference to persons on the basis of race, sex, color, ethnicity or national origin. It does not, however, prevent the City from: (1) investigating contractors to ensure they do not engage in unlawful discrimination, or (2) taking steps to remedy individual, proved cases of discrimination. Nor does it prevent the City from implementing programs that maximize opportunities for all qualified persons to be involved in and benefit from contracting with the City.

2. The Disparity Study may, if adequate factual evidence exists once it is completed, serve as a basis for a federal court to fashion a narrowly tailored remedy for violations of federal law. Further, it may assist in the development of race- and gender-neutral outreach and contracting programs that better target all qualified contractors and businesses. It cannot, however, form the basis for a race- or gender-based contracting program without an order from a federal court mandating such a program.

BACKGROUND

Previous City Attorney Opinions and Memoranda have detailed the history of the City's efforts to craft a meaningful program to remedy race- and gender-based discrimination involving City contracts. In Opinion Number 96-2 (October 1, 1996), we reviewed the City's Disparity Study, which had been commissioned to develop the necessary factual predicate for a legal race- and gender-based contracting program. We concluded that, as it existed on October 1, 1996, the Disparity Study did not include enough evidence of race or gender discrimination to justify a race- or gender-based program. This conclusion was based upon the then most recent federal appellate case law addressing the issue. Opinion No. 96-2 at pp.1-7.

In early 1997, the Public Safety & Neighborhood Services (PS&NS) Committee of the City Council directed City staff to complete the evidentiary part of the Disparity Study. The Committee also asked the City Attorney for a supplemental opinion on the viability of any sort of race- or gender-based program, taking into account case law from the Ninth Circuit that predated 1996 but that suggested the court might allow a more expansive approach to justifiable race- or gender-based programs.

Since the last directive from the Committee, the governing law has developed dramatically. Proposition 209, case law interpreting its meaning and scope, and rulings on other, similar Equal Protection challenges to race- or gender-based programs have changed the legal

precedent for evaluating the issues surrounding the City's Equal Opportunity Contracting Program (EOCP) and the use of the Disparity Study. This memorandum will explain the new precedent, examine its application to the City's existing programs, and apply it to alternatives the City might consider in light of, or even apart from, the completed Disparity Study.

ANALYSIS

I

Developments in the Law

A. Proposition 209

Proposition 209, the California Civil Rights Initiative, was adopted by the people of the State of California on November 5, 1996. Of almost nine million votes cast, 4,736,180 Californians voted in favor of the initiative, and 3,986,196 voted against it. Proposition 209 is now Article 1, Section 31 of the California Constitution.

The language of Proposition 209 is straightforward.[1] It prohibits state and local governments from discriminating against or affording preferences to any person or group of people based on race, sex, color, ethnicity, or national origin in their employment, education, or contracting programs. Certain limited exceptions are set forth in sections (c) through (e): section (c) exempts sex preferences where a specific gender is a necessary qualification for a specific occupation or program; section (d) excepts existing court orders or consent decrees from its effects; and section (e) allows preferences where required for the receipt of federal funding.

Coalition for Economic Equity v. Wilson, 110 F.3d 1431, 1435 (9th Cir. 1997), is the first published opinion from an appellate court discussing Proposition 209. The Plaintiffs in that case (who include the NAACP, AFL-CIO, and various minority and women's business organizations) filed suit against Governor Wilson and other state executives on November 6, 1996, the day after Proposition 209 was passed by the electorate. Plaintiffs sought declaratory and injunctive relief, claiming that Proposition 209 violated the Equal Protection and Supremacy Clauses of the United States Constitution.

The District Court granted Plaintiffs' request for a temporary restraining order on November 27, 1996, and for a preliminary injunction on December 23, 1996, enjoining the State from implementing Proposition 209 until a trial or final judgment in the case. Defendants and Defendant/Intervenor Californians Against Discrimination and Preferences appealed the decision to the Ninth Circuit. On April 8, 1997, the Ninth Circuit held, as a matter of law, that Proposition 209 does not violate either the Equal Protection Clause or the Supremacy Clause of the United States Constitution. Based on its ruling, the Court vacated the preliminary injunction and remanded the case to the District Court. 110 F.3d at 1448.

Plaintiffs have filed a petition for review, which is pending with the United States Supreme Court. Plaintiffs also asked the Supreme Court to stay the effect of the Ninth Circuit's ruling. However, that request was denied. At this time, Proposition 209 is an enforceable

provision of California's Constitution.

1. Proposition 209 Eliminates Affirmative Action Programs That Focus on Race or Gender

The operative language of Proposition 209 is contained in section (a):

> (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Pursuant to this provision, government agencies may not discriminate or grant preferential treatment based on race, sex, color, ethnicity, or national origin. "Discriminate," as it is used in Proposition 209, is intended to be the reverse of "preferential treatment."[2] A person is discriminated against when he or she is treated differently from another because of his or her race, sex, color, ethnicity or national origin. A person is preferred or receives preferential treatment when he or she receives some benefit because of his or her race, sex, color, ethnicity, or national origin. When one person receives preferential treatment, another person is discriminated against if the second person would have received the same benefit but for his or her race, sex, color, ethnicity, or national origin. Coalition v. Wilson, 110 F.3d at 1439.[3]

By banning preferential treatment, Proposition 209 bans affirmative action programs implemented by government agencies that use percentages, quotas, or set-asides to meet a goal of including or benefitting minorities and/or women. Where those programs seek to confer a benefit on individuals or groups identified by gender, race, color, or ethnicity, they are no longer legal. Proposition 209 bans government "programs that would prefer contractors of a certain race or gender in the evaluation of bids for public contracts, programs that would prefer prospective employees of a certain race or gender for public employment, and programs that would prefer prospective students of a certain race or gender for public education or financial aid." 110 F.3d at 1438. Likewise, outreach programs that focus on reaching particular racial or ethnic groups within the community, and do not provide the same outreach to others, express a preference for those groups, and are no longer permitted.[4]

2. Proposition 209 Applies Only to Governmental Action

Proposition 209 is limited to "state" action, including governmental action on the local level. Subsection (f) specifically defines "state" as including, but not limited to, "the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state." Accordingly, Proposition 209 directly applies to the City of San Diego and its activities in "public employment, public education and public contracting."

Although Proposition 209 has "a dramatic impact within its scope of operation . . . this scope covers only a limited, well-defined area of government action."[5] Proposition 209 does not

apply to the employment, education or contracting activities of wholly private entities. For example, if the Building Industry Association (BIA) chose to sponsor a program for women in the industry on writing contract proposals, the BIA could do so, and could limit attendance to women, without violating Proposition 209.

If, however, the City of San Diego required or paid for a contractor to provide an educational seminar that expressly targeted minority and women business owners, the City would be taking action that prefers a group of people based on their gender or race, in violation of Proposition 209. By contrast, a City-sponsored or City-funded educational program open to all contractors, would not violate Proposition 209. Likewise, if the City uses a notice program to solicit bids on upcoming projects that includes advertising in all local newspapers, including newspapers that serve particular ethnic communities, that program reaches out to all potential applicants and does not violate Proposition 209.[6]

3. Proposition 209 Applies Only to Preferences Based on Race, Sex, Color, Ethnicity, or National Origin

> Proposition 209 discusses five categories of discrimination or preferential treatment: race, sex, color, ethnicity, or national origin. Any program that identifies and prefers people based on these categories is called into question.

"Race" and "color" include all races and colors, majority and minority alike. "Sex" means gender, i.e., male or female. "Ethnicity" refers to groups like Jews or Gypsies that are not necessarily considered a separate race but are often defined by an ethnic relationship.[7] "National origin" means the country of a person's origin, but does not necessarily include a classification based on a person's citizenship status.[8]

Membership in a Native American Tribe is considered a political categorization because Native American Tribes are sovereign nations.[9] Since membership in a Native American Tribe is not mentioned in Proposition 209, governmental agencies may not be prohibited from considering that fact. However, classifications based only on being "Native American," and not as part of an identified politically separate tribe, are racial and are not permitted.[10]

4. Proposition 209 Does Not Ban Other Bases for Preference

The only preferences that are banned by Proposition 209 are those that use any of the five categories listed. There are other categories and bases for distinction, however, that are not included in Proposition 209, and not affected by its provisions.

> Thus, programs that prefer poor applicants, or people who did fairly well on tests despite having gone to a bad school, or children who were raised in single-parent households, or groups defined using any other neutral classification, are untouched by [Proposition 209]. Preferences for applicants who speak a foreign language that will be useful in the job, or who have ties to the geographical area that they're supposed to serve, would likewise remain allowed. This is even true if these neutral

programs end up disproportionately benefitting people of a particular race or ethnicity or sex.[11]

a. Proposition 209 Does Not Affect Programs Targeting Economically Disadvantaged, Small, or Start-Up Businesses

Proposition 209 does not ban government action directed toward assisting economically disadvantaged, small, or start-up businesses. Cities and counties may identify such segments of the population or individuals and take action to assist those groups or persons, as long as they articulate justifiable reasons for doing so.[12]

The distinction between race, sex, color, ethnicity and national origin on the one hand, and the economically disadvantaged on the other, goes to the heart of Proposition 209. The argument included in the ballot pamphlet by the authors of Proposition 209 states:

> THE BETTER CHOICE: HELP ONLY THOSE WHO NEED HELP!
> We are individuals! Not every white person is advantaged. And not every "minority" is disadvantaged. Real "affirmative action" originally meant no discrimination and sought to provide opportunity. That's why Proposition 209 prohibits discrimination and preferences and allows any program that does not discriminate, or prefer, because of race or sex, to continue.[13]

Any program already in existence that bases its criteria on economic need without considering race or sex should not be affected by Proposition 209.

b. Proposition 209 Does Not Include Preferences Based on Disability or Service in the Military

The list of banned preferences in Proposition 209 does not include persons who are disabled, veterans, or disabled veterans. Presumably, public agencies may continue to use these categories as bases for benefit programs, to the extent permitted by current federal and state law.

c. Proposition 209 Does Not Ban Preferences for Local Business Enterprises

Proposition 209 does not affect programs designed to benefit local business. 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 upheld a city ordinance designed to promote local business enterprises (LBEs). For the purpose of the ordinance, the city defined LBEs as follows:

> [A] business firm with fixed offices or distribution points located within the boundaries of the City and County of San Francisco and listed in the Permits and License Tax Paid File with a San Francisco business street address. Post Office box numbers or residential addresses may not be used solely to establish status as a "Local Business."

813 F.2d at 943 n.44. In support of its ordinance, the city made findings that LBEs suffer a competitive disadvantage with businesses from other areas because of the higher costs of doing

business in San Francisco, and that the public interest would best be served by encouraging businesses to locate and remain in San Francisco by providing a minimal preference to local businesses in the awarding of city contracts. 813 F.2d at 943. Under the ordinance, LBEs receive a five percent bidding preference on city contracts.

> The Ninth Circuit found that the city had legitimate government interests for the ordinance and that the ordinance used "measured and appropriate" means to further those interests. "We see no constitutional infirmity in the city's modest attempt to support local businesses and to induce other businesses to move there." Id. at 944.

The City Attorney's Office has previously opined that local preferences would be subject to strict constitutional challenges based on a violation of the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. The case law continues to support this view. However, the situation in San Francisco illustrates that while the threshold for justifying a local preference is high, it is not unattainable. In any event, nothing in Proposition 209 affects the standard for establishing a local preference.

5. Proposition 209 Does Not Preclude Remedies for Victims of Actual Discrimination

In a footnote to Coalition for Economic Equity v. Wilson, in response to an argument posed by Plaintiffs, the Ninth Circuit addressed the issue of whether Proposition 209 eliminates "race-specific relief" as a remedy for intentional discrimination, stating:

> "[R]ace-specific relief" is hardly synonymous with "preferential treatment on the basis of race." A state may "eradicate racial discrimination" in many ways that do not involve racial preferences. When, for example, a state gives the *identified* victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference "on the basis of their race" but on the basis that they have been individually wronged.

Coalition v. Wilson, 110 F.3d at 1437 n.7. Proposition 209 outlaws discrimination, as well as preferences, and in section (g), provides the same remedies for discrimination as are presently available under state law.

> (g) The remedies available for violations of this section shall be the same . . . as are otherwise available for violations of then-existing California anti-discrimination law.

Under Proposition 209, then, if a person or group can prove it has been individually discriminated against based on race or sex, the court may fashion a remedy to address that discrimination. That remedy will not violate Proposition 209 as long as it directly redresses the actual discrimination. Likewise, section (d) of Proposition 209 permits court orders and consent decrees existing as of November 6, 1996, to remain in effect, even if they include race- or gender-based preferences.

6. Proposition 209 Does Not Prohibit Preferences Required by Federal Programs In Order to Receive Federal Funds

Section (e) of Proposition 209 allows preferences where required for the receipt of federal funding. Under this exception, before a public agency can participate in a federal program that uses preferences (i.e., quotas, set-asides, or goals), the federal program must meet two requirements: (1) the preferential action must be required for the public agency's eligibility in the federal program, and (2) ineligibility must result in a loss of federal funds to the public agency. The preferential action must be *required* by the program; "it's not enough that it be potentially helpful, or generally consistent with the spirit of the federal program."[14] If the public agency can participate in the federal program and receive federal funds without taking the preferential action included in the program, then the public agency may not take that action without violating Proposition 209.

7. Proposition 209 Permits Bona Fide Qualifications Based on Sex

Section (c) provides that nothing in Proposition 209 "shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting." Examples of gender qualifications that are currently part of California law include sex-segregated bathrooms, girls' sports teams, gender-based dorm room assignments in college, and strip searches of female inmates by female guards.[15] Gender qualifications may also apply to programs such as providing female counselors in a battered women's shelter.[16] As in these examples, the gender qualification must be necessary, not merely desirable, "to the normal operation" of the program or job. There are many cases under Title VII and the California Fair Employment and Housing Act discussing what is a bona fide qualification. Those cases and standards should apply in making the same determinations under Proposition 209.[17]

B. Monterey Mechanical v. Wilson

Monterey Mechanical v. Wilson, -- F.3d --, 97 D.A.R. 11,464 (Sept. 3, 1997), is a recent opinion from the Ninth Circuit Court of Appeals discussing an equal opportunity contracting program mandated by state law. The underlying dispute in Monterey Mechanical took place before passage of Proposition 209. The Court's analysis focuses on traditional principles of Equal Protection law and does not discuss Proposition 209.

In Monterey Mechanical, California Polytechnic State University solicited bids for a multimillion dollar utilities upgrade project. The University required that the bids comply with the equal opportunity goals set forth in the California Public Contract Code (the Code). Specifically, Section 10115 of the Code requires contractors to subcontract not less than 15% of the work to minority business enterprises (MBEs), 5% to women business enterprises (WBEs), and 3% to disabled veteran business enterprises (DVBEs). A contractor can comply with the goals by either meeting the percentages or showing a good faith effort to do so. In order to establish "good faith" under the statute, the contractor must identify, advertise to, and solicit and consider bids from potential M/W/DVBE subcontractors and suppliers. The contractor is required to document its efforts, including names, dates and phone numbers. 97 D.A.R. at 11,467. A contractor that is itself an MBE, WBE, *and* DVBE will satisfy the statute as long as it keeps at least 23% of the work for itself. An MBE contractor could satisfy the statute by keeping at least 15% of the work, and subcontracting 5% to WBEs and 3% to DVBEs, or meeting the good faith requirements for those categories. Id.

In the bidding process for the University's contract, Plaintiff Monterey Mechanical submitted the lowest bid. However, Monterey Mechanical's bid was rejected as non-responsive because it did not subcontract out 23% of the contract amount, did not comply with the good faith requirements, and was not itself an MBE, WBE or DVBE. The contract was awarded to the next lowest bidder, Swinerton and Walberg. Swinerton and Walberg had complied with the good faith requirements of the statute. 97 D.A.R. at 11,464.

Monterey Mechanical sued the University claiming that the Code's bidding requirements violate the Equal Protection Clause of the United States Constitution. The District Court denied Monterey Mechanical's request for a preliminary injunction. Monterey Mechanical appealed. The Ninth Circuit overruled the District Court, finding the Code sections unconstitutional. 97

D.A.R. at 11,470.

The Court found that under the Code, all contractors are not treated the same because minority- and/or women-owned contractors have the option of keeping a percentage of the business to themselves in order to meet some of the requirements of the statute, while other contractors do not have that option. "An enterprise in all the designated categories can, by keeping at least 23% of the work for itself, avoid any of the requirements of the statute." 97 D.A.R. at 11,467. The Ninth Circuit rejected the District Court's finding that the difference in treatment is de minimis, stating that "there is nothing de minimis" about 23% of $21 million. Id. Further, although the Code does not impose rigid quotas, the court found that the "non-rigid system of goals and good faith requirements" under the statute imposes a *classification* because it encourages set-asides. The Code:

> requires distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information. Thus the statute may be satisfied by distribution of information exclusively to persons in the designated groups. Bidders in the designated groups are relieved, to the extent they keep the required percentages of work, of the obligation to advertise to people in their groups. The outreach the statute requires is not from all equally, or to all equally.

97 D.A.R. at 11,468. Using the same reasoning, the Court found that the Code imposes higher expenses on some than others, because minority- and/or women-owned firms may be able to avoid the expense of providing notice to others in their class. Id.

> Having found a classification subject to Equal Protection analysis [18], the Court then applied that analysis to the Code sections. The Court found that the University failed to meet its burden of justifying the classifications in the Code. According to the Court, the University offered no evidence that either it or the State had discriminated against the groups benefitted by the Code. The Court discounted the legislative findings contained in the Code because they did not document past discrimination against the benefitted groups. Further, although the goal of the Code is to assist the economically disadvantaged, the Code had identified such individuals not by their economic status but by their race and gender. Id.

The Court also found that the Code was not narrowly tailored to address discrimination against a particular minority, but instead included all minorities. "[S]ome of the groups designated are, in the context of a California construction industry statute, red flags signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored." 97 D.A.R. at 11,468-69. In order for the Code to pass constitutional muster, it must be a remedy for past discrimination. Id. at 11,470. For all of these reasons, the court found that the statute was unconstitutional: it treated different groups differently without any "constitutionally required justification" for doing so. Id.

C. Other Case Law

As stated in the Background to this Memorandum, one of the initial purposes of a follow-up report from the City Attorney was to further explore the availability of a race- or gender-based program under more expansive Ninth Circuit case law dating back to 1991 and before. The previous Memorandum of Law had focused on recent case law from other jurisdictions, which indicated a judicial trend towards restricting the availability of race- or gender-based programs without detailed evidence that was lacking in the City's Disparity Study. The suggestion was made that the older Ninth Circuit case law might allow for such programs even without such specific detail.

In light of the sweeping changes to California's legal landscape in this area, wrought by Proposition 209 and the Ninth Circuit's recent decisions in Coalition for Economic Equity v. Wilson and Monterey Mechanical, much of the Ninth Circuit's older case law is irrelevant unless the United States Supreme Court agrees to hear, and then reverses, the decision in Coalition. Barring such action, it seems unlikely the Ninth Circuit would revert to its pre-Proposition 209 direction in the foreseeable future. As such, further evaluation of that earlier case law would not yield an opinion that could support programs that Proposition 209 and Coalition now prohibit.

II

The City's Existing Equal Employment Opportunity Programs

A. San Diego Municipal Code sections 22.2701 - 22.2708

The language of the ordinance establishing the City's Equal Employment Opportunity commitment, San Diego Municipal Code sections 22.2701-22.2708, is generally race- and gender-neutral. It requires that persons doing business with the City neither: (1) unlawfully discriminate in their own hiring practices, nor (2) allow their subcontractors to discriminate in their hiring practices. It does not set out any race- or gender-specific requirements to comply with its terms. As such, it does not violate Proposition 209 and can remain substantially intact.

Notwithstanding this conclusion, the City may wish to change the language of section 22.2705(c), which states that:

> Any Equal Employment Opportunity Plan approved by the City shall not include quotas, goals or timetables for increasing women and minority employment . . .

To conform this provision to the broader, race- and gender-neutral focus of Proposition 209, we recommend that the provision be revised as follows:

> Any Equal Employment Opportunity Plan approved by the City shall not include quotas, goals or timetables for increasing *the employment of any particular identified racial, ethnic, or gender group, but shall be focused on a general plan that confirms and reinforces the contractor's commitment to equal employment opportunity for all qualified persons.*

B. Use of Minority and Women Ownership/Employment Information - Generally

A principal goal of Proposition 209 is to eradicate race- and gender-based preferential treatment for contractors seeking state or local contracts. Information that relates to the race and gender composition of a contractor's ownership or work force is thus of limited use. However, as set forth above, there are still situations where the race or the gender of a particular contractor is relevant; for example, in the award of contracts involving federal grants, and in investigating suspected actual race- or gender-based discrimination against employees or subcontractors. Therefore, the City may continue to require such information from contractors, and need only modify how that information is used once it is obtained.

C. Review of Proposed Contractor's Own Work Force

The City has the right and the obligation not to do business with persons or entities who engage in unlawful discrimination. To that end, the City uses a Work Force Report (a copy of which is attached to this Memorandum as Attachment B), which requires contractors to break down their employee work force by race and gender. The City's EOCP staff compares the information on the contractor's Work Force Report to the County Labor Force Availability (CLFA) data (Attachment C) to determine whether a contractor might be unlawfully discriminating in its employment practices, warranting further investigation into the contractor's actual practices. The EOCP staff may also call for the contractor to propose an EEO Plan to aid in remedying the perceived imbalance in the contractor's work force.

Conceptually, the Work Force Report and analysis do not result in a violation of Proposition 209 and may continue to be used to investigate a contractor's hiring practices. However, certain structural changes to these forms should be made, and the implementation process clarified, to ensure that the information is used in a way that does not violate Proposition 209. The use and scope of the EEO Plan, which effectively could require a contractor to change the way it conducts its hiring practices, should be modified to avoid being characterized as a de facto "preferential treatment" practice mandated by the City.

1. Work Force Report -- Structure. As currently structured, the Work Force Report focuses on statistics for certain minorities and female employees. Non-minority male employees are referred to in a generic "other" category. Similarly, the CLFA chart identifies specific minority and women categories, but fails to reflect any statistics for non-minority males. To reinforce the race- and gender-neutral use of these documents, they should be revised to reflect all persons, however the City chooses to categorize them, so that all statistics are available to be used in an equal manner.

2. Work Force Report -- Implementation. The larger issue is the extent to which these statistics can be used in the course of reviewing proposals and awarding contracts. Before the passage of Proposition 209, the City relied on a line of cases which allowed a presumption of discrimination to be based on finding statistical disparity between the percentage of available women and minority workers in the local work force, and the percentage of those types of workers employed by a given employer.

The seminal case on this issue is McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), in which a black employee who had been laid off was not re-hired when the company undertook an expansion and re-hiring effort. The employee alleged that the refusal to re-hire him was race-based. The Supreme Court held, among other things, that statistics concerning the employer's employment policy and practice would be "helpful" to determine whether the particular action taken with respect to the employee "conformed to a general pattern of discrimination against blacks." 411 U.S. at 805. The McDonnell Douglas Court cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision . . . ." Id. at n.19. Subsequent case law following McDonnell Douglas has established that such statistical disparities can be sufficient to create a presumption of discrimination, which must then be overcome by the employer showing a legitimate nondiscriminatory reason for the disparity in its work force.

Is the McDonnell Douglas presumption still allowed under Proposition 209? Historically, the cases have applied the presumption only to allegations of discrimination against women and minorities. Some may assert that in fact this is how the City applies it, effectively granting a "preference" to women and minorities because it places an extra burden--to prove nondiscrimination--only on non-minority males. This assertion, accurate or not, might be supported by the structure of the existing Work Force Report and CLFA chart.

However, on its face the McDonnell Douglas presumption should survive Proposition 209. The purpose of the presumption is to aid in the investigation and discovery of *any* unlawfully discriminatory hiring practices. If the Work Force Report and statistics are analyzed and applied in the same manner with respect to all categories and all contractors, then there is no preferential application of the Work Force Report and statistics, no unevenly burdensome impact on any given category of employer, and no violation of Proposition 209. Either the presumption applies, or it does not, without regard to the race or gender of the prime contractor--all that will matter is whether the contractor's work force matches or approximates the County availability statistics.[19] Any contractor whose work force does not meet this test will have the same burden of showing a legitimate, non-discriminatory reason for the disparity, and the same opportunity to overcome the McDonnell Douglas presumption.

Modifying the Work Force Report and CLFA chart as recommended in this Memorandum would underscore the City's intent to apply the McDonnell Douglas presumption in an evenhanded, lawful manner. Alternatively, the City could choose not to employ the McDonnell Douglas presumption and rely on other indicia and evidence to determine whether a contractor engages in unlawful hiring practices.

3. Equal Employment Opportunity Plan. An EEO Plan may be a viable tool for bringing into compliance a contractor who is found to actually be discriminating in its employment practices. The elements of the EEO Plan, however, must not require the contractor to give race- or gender-based preferences to certain groups or individuals in its future outreach and hiring decisions. For example, an all-minority firm may be subject to the McDonnell Douglas presumption of discrimination, if the CLFA data suggests that there should be non-minority workers available to do the work in the firm. The firm's EEO Plan must not then require the firm to perform focused outreach and give extra consideration to non-minorities,

based on the conclusion that they are, as a group, underrepresented in the firm's workforce. This would be a classic race- and gender-based preference. If compelled by the City, it would probably be prohibited by Proposition 209. Instead, an EEO Plan should set forth the means by which the contractor will broaden its outreach to all members of the business community.

If disparity in a contractor's work force is found to be the result of discriminatory hiring practices, the City has the option simply not to do business with that contractor, or to try to work with the contractor to remedy the discriminatory hiring practices through an EEO Plan. If, on the other hand, such disparity can be explained by other, legitimate reasons, the City should have no further role in deciding the composition of the contractor's work force and an EEO Plan should not be required. The Work Force Report and analysis survives Proposition 209 because it can and should be implemented in a race- and gender-neutral fashion, to aid in rooting out unlawful discrimination. An EEO Plan that does not require focused, preferential outreach likewise should not be prohibited by Proposition 209.

D. Monitoring/Requiring Subcontractor Involvement

Nothing in Proposition 209 precludes the City from using its contracting practices to increase the opportunities for all interested and qualified persons to participate in City work. One established means for maximizing these opportunities is to require the involvement of subcontractors in both the bidding and contracting processes. So long as the City's subcontracting requirements provide the same opportunities to all eligible contractors without regard for their race or gender, there should be no grounds for a Proposition 209 challenge. Examples of such legitimate requirements are discussed below in section III of this Memorandum.

The City's existing policies and practices, however, must be revised to eliminate the references to women and minorities that appear to exclude persons not falling into those categories. For example, requirements that contractors notify "people of color and female" firms and recruitment sources should be revised to include all firms that are qualified, without regard to the race or gender of the firm's owners. Likewise, required involvement in outreach, training programs, and advertising requirements should be broadened so as not to focus exclusively on minorities and women. Importantly, such efforts may still be aimed at small, start-up, and economically disadvantaged businesses, so long as race and gender are not factors in deciding which firms are "small," "start-up," or "economically disadvantaged."

The Minimum Participation Level goals (MPL goals), as they are currently used, should be eliminated[20]. A court following the rationale in Monterey Mechanical would likely find that these goals place burdens on non-minority, male firms that are not shared by their minority- and women-owned counterparts. Although MPL goals are "voluntary," the refusal to participate in the MPL program can be deemed non-responsive, and the penalty is the loss of the contract. Further, under the City's existing guidelines, a firm in which the race or gender composition of the ownership meets the MPL goals need not take any action to include others, because the goal can be met by *any* combination of MBEs, WBEs, and DVBEs "at the prime or subcontractor level." There is no maximum specified, and no requirement that non-MBE/WBEs also be included in the contract.

As in the case of the Public Contract Code in Monterey Mechanical, the City's MPL goals may require divestiture of a portion of the contract only when the contractor is not an MBE, WBE or DVBE. Further, solely on the basis of their race and gender, non-MBEs/WBEs/DVBEs face an additional hurdle in order to complete the bidding process. Under either Monterey Mechanical or Proposition 209, the MPL goals would likely be invalidated because they grant a preference to MBE and WBE contractors, and discriminatorily disadvantage contractors who do not fall into these classifications.

An outreach and contracting program that is implemented in a race- and gender-neutral fashion may still encourage the involvement of MBEs and WBEs, and even advise contractors of the levels that the City *anticipates* such involvement would reach, so long as the efforts to involve MBEs and WBEs are truly voluntary and there is no consequence when a firm fails to meet the anticipated levels. The City of Los Angeles, for example, employs a comprehensive equal opportunity contracting program that includes anticipated levels of MBE/WBE participation, but awards no credit for inclusion of MBE/WBE participation, employs no penalties or extra measures for a contractor's failure to meet those levels, and strongly encourages contractors to outreach to all qualified subcontractors. Los Angeles' program has been upheld by the courts in California. See, Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161 (1994) (Domar I) and Domar Electric, Inc. v. City of Los Angeles, 41 Cal. App. 4th 810 (1995) (Domar II).

Testimony at the public hearings conducted here in San Diego included anecdotal support for the system in operation in the City of Los Angeles. As discussed in more detail below, the Los Angeles model and other legal means still exist for maximizing equal opportunity in City contracting.

III

The Future of the City's Equal Opportunity Efforts

There has been a tremendous amount of attention focused on what Proposition 209 prohibits. All programs, however benign, that appear to give a preference based on race, ethnicity, or gender will be subject to, at the least, close scrutiny, and very likely, a lawsuit. However, a stated purpose of Proposition 209 is to ensure that equal opportunity to all who seek to participate in government contracts becomes a reality. The elimination of preference programs does not prevent the City from developing programs to strengthen and support the City's commitment to equal opportunity, and to maximize "the opportunity [for bidders] to compete for and perform contracts and services." Domar I, 9 Cal. 4th at 166. Many programs previously considered but not implemented could be revived and enacted. As the doors to goal-based programs close, alternative programs are still available to maintain a strong equal opportunity contracting process. This section will address some of the options available to the City that will not violate the race- and gender-neutral standard required by Proposition 209, and will create contracting opportunities for every person or business on an equal basis.

A. Alternative Proposals

There are a number of alternatives the City may implement which would further the objectives stated in the ballot arguments by Proposition 209 proponents. The ballot language stated: "Government should not discriminate." Coalition v. Wilson, 110 F.3d at 1434. Implicit in the ballot language is an understanding that the City will not permit discrimination by the parties with whom it contracts. To do so would make the City a passive participant in the discrimination, thereby violating the provisions of Proposition 209. As the court stated in Coral Construction Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991): "Mere infusion of tax dollars into a discriminatory industry may be sufficient government involvement" to find that the government is a passive participant in actual discrimination.

1. Compliance Audits

Perhaps the most effective tool the City has in order to ensure equal opportunities are available to all potential bidders is a nondiscrimination compliance audit. Employers and prime contractors could be audited on a regular basis to determine whether their practices foster discrimination, and whether their outreach programs actively promote equal opportunity.

Workforce audits are already permitted by the municipal code. Audits of subcontracting procedures may also be made part of the equal opportunity process. Investigations by the EOCP staff that uncover discriminatory practices by a prime contractor as a result of a complaint filed by the victim could be used in two ways. First, investigation results may be used as a basis for fashioning a specific remedy to correct the harm to the complainant. Second, if the City contract provisions include a nondiscrimination clause, the result could be used as the basis for a finding that the prime contractor has breached the contract. Penalties for the breach, including termination of the contract or future debarment, should be determined on a case by case basis taking into account all mitigating and/or aggravating factors.

2. Small and Disadvantaged Business Program

A frequently cited barrier to more inclusion in the City contracting process is that new and small firms cannot compete because the size of many City contracts precludes them from bidding. Small firms tend to be involved at the subcontracting level, rather than at the prime contractor level. Simply breaking large contracts into smaller contracts would allow greater bidding flexibility, thus allowing new and small businesses to participate. Such a program would not violate the provisions of Proposition 209 because no race or gender preferences are required.

The sizing of contracts could be determined in a number of ways. First, the City could require that all contracts over a certain dollar amount be divided into smaller contracts each to be bid separately. Under this method, the City would decide how the contract would be divided. The size could change from project to project to maximize accessibility to the widest range of small contractors. Second, on contracts over a specific dollar amount, the City could require the *prime contractor* to subcontract a certain proportion of the contract. Here, based upon its needs and abilities, the prime contractor would decide how to divide the contract. Neither method runs afoul of Proposition 209 because the smaller contracts would be open to all bidders equally. In both methods, the purpose is to maximize opportunities for the greatest number of bidders.

3. Bond Requirements and Assistance Programs

Proponents of the ballot measure have also said that under Proposition 209, anything that acts as a bar to equal opportunity is suspect. Bonding and surety programs that unreasonably and disproportionately affect certain bidders may not violate Proposition 209, but might run afoul of the Equal Protection Clause of the Constitution.[21] The City's bonding and surety requirements have been unchanged for many years. The amounts often bear no relationship to the work being done but are requirements of the Charter or Municipal Code. These requirements can prevent new or small bidders from competing because they are unable to obtain the required insurance or bond. Bonding and surety requirements could be evaluated for necessity and relationship to the job being bid. Where requirements are inordinate, disproportionate to the amount of work being performed by a bidder, requirements should be amended. Additionally, making bonding assistance programs available to all bidders on an equal basis could eliminate the disproportionate impact the current bonding requirements have on certain businesses. The City could still meet its insurance needs, but open the contracting process to a greater number of qualified bidders.

4. Mentor/Protégé Program

The City could develop a strong mentor/protégé program. This idea has been raised, but to date no City program exists. Such programs are in effect in a number of jurisdictions and agencies, including the California Department of Transportation. The goal of the mentor/protégé program would be to train newly formed companies to compete on an equal footing in the marketplace. Ideally, a qualified protégé would be guaranteed a portion of a contract as a subcontractor of the mentor, either during or after the training portion of the program is complete. Such training would serve as a solid base on which the protégé could bid on future contracts. Again, Proposition 209 would not be implicated as long as the program is open to all

companies on an equal basis. Qualifications should focus on a company's technical skills and abilities, rather than race or gender status.

5. Outreach

Proposition 209 extends beyond actual contracting and employment practices, to preclude outreach efforts that are limited by race and/or gender. However, nothing precludes the City from imposing greater race- and gender-neutral outreach requirements on contractors generally. The City could continue the current requirements for good faith outreach efforts, but expand the requirements beyond MBEs and WBEs to include all interested bidders. Such an outreach requirement would ensure greater access to parties who may be interested in competing for work on City contracts. As previously noted, the idea is to maximize the opportunities available to all bidders.

6. The City of Los Angeles Model

As discussed above, the City of Los Angeles engages in a comprehensive outreach program that has already been found by the California courts to be race- and gender-neutral. Accordingly, a program that follows the Los Angeles model should not violate Proposition 209. A copy of the Los Angeles program, as explained in Domar I, is enclosed as Attachment D.

The program has many components, but because the components are applied equally to all contractors, and require outreach to all potential subcontractors, the program is race- and gender-neutral[22]. The City of San Diego could incorporate this type of program into the contracting process at the outset, requiring the contractor to fulfill the program's requirements at the same time it submits the Work Force Report. Further, to maximize the pool of subcontractors to be notified, the City could require interested subcontractors to place their name and other relevant information on a City-maintained list (similar to the City's current MBE/WBE/DBE/DVBE Directory) that can be furnished to any contractor bidding on a City contract. All of this simplifies the record keeping for both the contractor and the City staff charged with ensuring compliance.

This discussion of alternative proposals is not exhaustive. It is meant simply to illustrate the wide range of programs still available to the City.

B. Programs and Actions Unaffected By Proposition 209

As discussed previously, Proposition 209 leaves intact two types of affirmative action measures: (1) programs required in order to obtain federally funded monies, and (2) individual redress for identified victims of race- or gender-based discrimination.

1. Federal Funding Requirements

Where federal funds are at issue, Proposition 209 carves out an exception to the general "no preference rule" and allows federally required preference programs to remain intact. Proposition 209 provides at subsection (e): "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish and maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." This is a narrow exception. Proponents of Proposition 209 assert that this exception is limited to those cases where preferences are required as a condition of obtaining the funds and where failure to enforce the federal guidelines would lead to a loss of the funds. If the goals in the federal program are discretionary, however, then California contracting agencies may not require them.

2. Redress for Individual Instances of Discrimination

The second tool that Proposition 209 leaves intact is the ability of the City to redress specific identified instances of discrimination suffered by individuals who have sought government contracts and failed to obtain them due to unlawful discriminatory practices. The court in Coalition v. Wilson said: "when . . . the state gives the *identified* victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference 'on the basis of their race' but on the basis they have been individually wronged." 110 F. 3d at 1431, n.7 (Emphasis in original.)

Crafting victim specific remedies will be a new challenge for the City and no guidance for such remedies is found in applicable case law. Previous attempts at correcting apparent disparities in City contract participation have been group oriented. The City could direct EOCP to develop a means of receiving and investigating complaints of discriminatory action. Criteria for determining whether apparent disparities are caused by unlawful discriminatory practices or are the result of legitimate selection procedures should be developed. If discrimination is proved, the victim may be made whole. Based on the Ninth's Circuit's clarification cited above, permissible remedies might include the award of a subsequent contract for a dollar amount equal to the amount lost (assuming the victim otherwise meets the lowest responsible bidder requirements) or granting the victim a specific preference on a subsequent similar contract.

C. The Future of Narrowly Defined Preference Programs

It is not clear whether Proposition 209 allows the findings of the Disparity Study to be used to craft a narrowly tailored program to redress identifiable past discrimination against a group. The language of the Proposition 209 says only that it will not invalidate a court order or consent decree *in place at the time the initiative becomes effective*. The initiative does not address whether a consent decree or court order requiring a race- or gender-based remedy may be instituted after the effective date of the initiative, and the express exemption for existing court orders suggests that future court orders of this type are not generally permitted. The court in Coalition court stated that specific instances of individual discrimination can be remedied, but did not address the question of whether findings of discrimination against a group, even where identifiable, may be remedied by a program which would otherwise withstand scrutiny under the Croson standard.

However, if a *federal* court has found a violation of the federal Constitution or a federal statute, state law cannot prevent a necessary remedy. Thus, even under Proposition 209, if the findings of the Disparity Study show identifiable discriminatory practices have prevented specific groups from fully participating in the City's contracting process, a narrowly tailored program may be an available remedy if ordered by the federal court.

This issue could be placed before the federal court in two ways. First, based upon the findings of the Disparity Study, the City could fashion a narrowly-tailored group remedy. Upon determining that there is someone who disagrees with the legality of this new remedy, the City could seek declaratory relief from the federal court. The federal court would have to determine: (1) that the Disparity Study, in fact, shows a violation of the federal constitution (in this instance, the Equal Protection clause) or a federal statute, and (2) that a race-specific remedy is *necessary* to provide adequate relief.

Alternatively, the City may be sued by a member of an affected group, using the findings of the Disparity Study to claim that a race- or gender-based program is necessary. Again, if the court finds a violation of federal law *and* the necessity for a race- or gender-based remedy, it may impose such a remedy either after a trial or through a consent decree. "The court has authority to approve a settlement that modifies state law. Federal courts have broad powers to remedy violations of the federal Constitution." Dillard v. City of Foley, 926 F. Supp. 1053, 1065 (M.D. Ala. 1995). However, "[t]his involves the court giving proper respect and consideration to the integrity and function of local government institutions . . . and modifying the state's plan only to the extent necessary to cure statutory or constitutional defects." Id. Thus any group-focused program can only be structured as a result of federal litigation.

Until more case law develops showing how the federal court might weigh such evidence and consider it in view of Proposition 209, and until the Disparity Study is complete, we cannot be confident that any federal lawsuit would result in a race- or gender-based program.

IV

Continuing Developments

A. High Voltage Wire Works v. City of San Jose

Immediately following the passage of Proposition 209, the City of San Jose adopted a resolution enacting a "Nondiscrimination/Nonpreferential Treatment Program." The resolution acknowledges the new constraints of Proposition 209 while seeking to reinforce a policy of nondiscrimination against MBE/WBE subcontractors. San Jose's program requires that contractors bidding on City of San Jose contracts demonstrate they have not discriminated against (or granted preferential treatment to) anyone. A copy of the San Jose program is enclosed as Attachment E.

On September 9, 1997, a non-MBE/WBE contractor filed suit in the Santa Clara Superior Court alleging that San Jose's new resolution and program violates Proposition 209, by requiring

a contractor to make certain race- and gender-specific efforts in their subcontracting efforts. Plaintiff alleges that these requirements effectively provide a preference to MBEs and WBEs, in violation of Proposition 209.

The litigation is new, and will not likely be resolved for months or even years. We will monitor the case, but do not expect it to yield any guidance for the foreseeable future. We will keep the Mayor, Council and Manager apprised of any developments in the case that would affect the City of San Diego's own equal opportunity efforts.

CONCLUSION

Proposition 209 and recent Ninth Circuit case law have substantially changed the options for developing a meaningful, effective equal opportunity contracting program. Case law supports outreach to women and minorities, but only if that outreach is equally extended to others. The circumstances in which a race- or gender-based program will be permitted are narrow. We can probably use such programs only when ordered by a federal court. In a federal lawsuit, the Disparity Study may be useful to establish a factual basis for the court's order.

Even without a federal court order, and without having to rely on the Disparity Study results, the law still allows the City to refuse to condone discrimination, to deny contracts to those who are found to engage in unlawful discrimination, and to provide specific relief to persons who have been individually discriminated against. Broader programs that will not violate Proposition 209 can help businesses that need assistance. And the City can craft stronger powers of investigation and enforcement to ensure the programs are as effective as possible.

The United States Supreme Court's decision whether to review the Ninth Circuit's decision in Coalition v. Wilson, is expected within the month. If the Court grants review, our office will recommend what actions the City should take while the case is pending. We would also be happy to further explain the opinions set forth in this Memorandum, or answer any other question you may have.

CASEY GWINN
City Attorney

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Attachments
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