

DATE: February 6, 1987

TO: Elizabeth Moore, Equal Opportunity Program
Coordinator - City Manager's Office
FROM: City Attorney
SUBJECT: The Effect of Assembly Bill 1464 on Charter .
94 and The City of San Diego's Construction
Award Policy

You have asked this office to review the provisions of Assembly Bill 1464 (Harris), Stats. 1986, ch. 1060, in order to determine its effect on The City of San Diego's construction contract award policy. This bill entitled "PUBLIC CONTRACTS - AFFIRMATIVE ACTION" became effective on January 1, 1987. The relevant portion of that bill set forth in section 2 states:

SEC. 2. Chapter 2 (commencing with Section 2000) is added to Part 1 of Division 2 of the Public Contract Code, to read:

CHAPTER 2. RESPONSIVE BIDDERS

2000. (a) Notwithstanding any other provision of law requiring a local agency to award contracts to the lowest responsible bidder, any local agency may require that a contract be awarded to the lowest responsible bidder who also does either of the following: emphasis added

(1) Meets goals and requirements established by the local agency relating to participation in the contract by minority business enterprises and women business enterprises. If the bidder does not meet the goals and requirements established by the local agency for that participation, the local agency shall evaluate the good faith effort of the bidder to comply with those goals and requirements as provided in paragraph (2).

(2) Makes a good faith effort, in accordance with the criteria established pursuant to subdivision (b), prior to the time bids are opened, to comply with the goals and requirements established by the local agency relating to participation in the contracts by minority or women business enterprises.

Paragraph (b) describes in detail the criteria to be used in determining a good faith effort. Paragraph (d) defines "local

agency" for the purposes of this section of the bill to include a charter city.

Sections 3 and 4 of the bill describe the findings and intent of the California Legislature as follows:

Sec. 3 The Legislature finds and declares that existing statutes requiring that contracts be let to the "lowest responsible bidder" have prevented many local agencies from considering the responsiveness of a bidder to affirmative action or minority or women business enterprise requirements. The Legislature further finds and declares that it is necessary to establish uniformity in determining whether or not bidders on public works contracts have made a good faith effort to meet the goals and requirements established by a local agency regarding the participation in the contract by minority business enterprises and women business enterprises. The Legislature further finds and declares that the encouragement of, and participation by, minority and women business enterprises in public works contracts is a matter of statewide concern. Emphasis added.

Sec. 4. It is the intention of the Legislature through the enactment of Sections 2 and 3 of this act to occupy the whole field of the regulation of procedures for determining good faith efforts by bidders on public works contracts. Thus, if a local agency determines to exercise the authority granted by subdivision (a) of Section 2000 of the Public Contract Code, the requirements imposed by that section shall, except as otherwise provided in subdivision (g) of that

section, be the exclusive procedure for determining whether bidders have made a good faith effort to meet the goals and requirements established by the local agency regarding participation in contracts by minority business enterprises and women business enterprises. Section 2 of this act prevails, to the extent of any conflict, over any provision of any charter of a chartered city establishing requirements and procedures

for determining whether bidders have made a good faith effort to comply with the goals and requirements established by the local agency relating to participation in the contract by minority or women business enterprises.

Emphasis added.

Initially it should be noted that the provisions of the bill are permissive. It is up to each local agency to determine if it wishes to exercise the authority granted by subsection 2000(a). However, once it does so, it must follow the remaining provisions of this bill.

This bill appears to be an attempt to redefine the California Supreme Court's interpretation of the term "lowest responsible bidder" in *Inglewood-Los Angeles County Civic Center Authority v. Superior Court*, 7 Cal.3d 861, 103 Cal.Rptr. 689, 500 P.2d 602 (1972). As we indicated in City Attorney Opinion No. 84-4, attached hereto for your convenience, the term "lowest responsible bidder," as defined in that case and applied to the wording of section 94 of the Charter of The City of San Diego, requires The City of San Diego, when awarding construction contracts, to only consider the qualifications of the bidder to do the construction work and the price. Compliance with minority business enterprise and women enterprise goals or the bidders good faith effort to reach such goals may not be used in determining the "lowest responsible bidder." However, as we have indicated to you on previous occasions, if The City of San Diego is not satisfied with the good faith efforts of the "lowest responsible bidder" the appropriate procedure is to reject all bids and begin the bidding process anew.

The key question, therefore, is whether or not The City of San Diego can exercise the authority granted by section 2000(a) of the Public Contract Code and consider "good faith efforts" in determining the "lowest responsible bidder" pursuant to Charter . 94. We believe it may not for the following reasons.

The state legislature has the authority to set standards for the awarding of construction contracts for general law cities and other state agencies and can certainly make it easier for these agencies to comply with lawful affirmative action programs. However, we strongly believe that the legislation lacks the authority to authorize a charter city to voluntarily adopt procedures which are contrary to specific charter provisions and which, in the absence of a valid affirmative action plan, may violate the Equal Protection Clause of the Fourteenth Amendment. This legislation was carefully drafted to make the exercise of the procedures outlined in subsection (a) voluntary in order to

avoid the argument that its provisions are unconstitutional as an unwarranted intrusion into the municipal affairs of the chartered cities. *Bishop v. City of San Jose*, 1 Cal.3d 56 (1969); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (1979); *Vial v. City of San Diego*, 122 Cal.App.3d 346, 175 Cal.Rptr. 647 (1981); *Piledrivers' Local Union v. City of Santa Monica*, 151 Cal.App.3d 509, 198 Cal.Rptr. 731 (1984). But the mere fact that the bill authorizes The City of San Diego to adopt its provisions does not relieve the City of the obligation to follow the clear language of its own Charter and to comply with the equal protection clauses of the state and federal constitutions.

It should be noted that The City of San Diego's equal opportunity policies are not affirmative action programs. This is an important distinction because the provisions of this bill are only available to assist agencies in meeting lawful affirmative action goals. To the extent that this bill authorizes local agencies to grant advantages in the bidding process to bidders who meet or attempt to meet certain hiring goals based on race or sex without the protections provided by a lawful affirmative action plan is constitutionally defective. In our Opinion No. 84-4 we concluded:

The City of San Diego cannot give preferential consideration to Minority Business Enterprises or Women's Business Enterprises unless two conditions are met. First, the City Council must be able to make specific factual findings of past racial or sexual discrimination, on the part of the City, in the awarding of such contracts. Second, the voters must approve amendments to Charter .. 35 and 94 which would give the City the authority to establish narrow remedial programs designed to cure the effects of past discrimination.

In July of 1986, the United States Supreme Court again stated that affirmative action programs must be narrow in scope and it ruled that a public agency must have convincing evidence of its own prior discrimination before embarking on a voluntary affirmative action program. Although the court relaxed the requirement for formal factual findings of discrimination, it clearly stated that the mere existence of societal discrimination, without more, is an insufficient basis for imposing a racial or sexually discriminatory remedy. *Wygant v. Jackson Board of Education*, 476 U.S. , 90 L.Ed.2d 260, 106 S.Ct. 1842

(1986). It is therefore evident that The City of San Diego cannot embark upon an affirmative action plan merely because the state legislature authorizes The City of San Diego to do so.

In summary, we believe that the provisions of this bill cannot relieve The City of San Diego from following the plain language of Charter . 94 and certainly cannot authorize The City of San Diego to voluntarily embark upon an affirmative action program without complying with the appropriate constitutional prerequisites.

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By

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Deputy City Attorney

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Attachment

ML-87-1