MEMORANDUM OF LAW

DATE: March 18, 1992

TO: Roger Frauenfelder, Deputy City Manager
FROM: City Attorney
SUBJECT: Consultant Selection Criteria: Race Classifications; Local Familiarity and Availability

This responds to your memorandum dated January 27, 1992 wherein you asked our advice on two issues relating to the consultant selection criteria of the Clean Water Program. The first issue concerns the relative percentage weight given to proposals for meeting the goals of the City's Equal Opportunity Contracting Program ("EOCP"). You have observed that the Minority Business Enterprise/Women Business Enterprise ("MBE/WBE") selection criterion now differs between the Clean Water Program and the Engineering and Development Department, a fact requiring explanation. Your second question involves the legality of including in the criteria a consideration of the consultant's local familiarity and availability.

I. CONSIDERATION OF MBE/WBE PARTICIPATION.

A. Present Practice in Consulting Contracts.

The current Clean Water Program selection criteria provide for up to ten (10) percentage points of overall consideration for MBE/WBE participation, while the criteria for Engineering and Development provide for up to twenty (20) percentage points for the same subject. The disparity exists because each of the City's departments is responsible for drafting its own criteria, although this is done under a common policy of the City Council. Relevant portions of Council Policy No. 300-7.A, "General Procedure for All Consultants," provide:

> 1. The affected department shall outline its objectives and the extent of the services that are required. This will be delineated in the form of a written document to be presented to prospective consultants.
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> 4. Consultants' presentations should be uniformly evaluated on a weighted basis of qualifications such as expertise, experience, understanding and approach to the problem, financial responsibility, capability of personnel and subcontractors on the project, conformity with the

City's Affirmative Action Program
sic and the ability to complete the
project within the required time
frame and budget.

Since each department's consulting needs may differ, subdivision A.1 of the policy provides that each department must establish its own selection criteria. Consequently, the requirement of subdivision A.4 that proposals be "uniformly evaluated" has been implemented on an intradepartmental, not an interdepartmental, basis. As you have observed, lack of City-wide consistency has resulted. This lack of consistency indeed warrants attention, but as explained below, it should not be the City's first concern with respect to its EOCP.

Important constitutional issues arise where racial classifications are used in the award criteria, and the weight of preference afforded those classifications is not the first question to be reached. The more basic question is whether there exists a valid and sufficient factual predicate for any use of race classifications at all. If this first question can be answered affirmatively (and in the City's present case, we believe it can not), only then can questions about the weight given to those classifications be legitimately asked.

The concern for the constitutional validity of the City's EOCP naturally extends beyond the Clean Water Program, and therefore the scope of this response is necessarily wider than your question. The question about the varying MBE consultant criteria among City departments begs the more fundamental question about the factual - and therefore constitutional - basis for employment of such criteria. We will limit our analysis to the consideration of only the racial classification aspect of this issue due to the number of recent case challenges on this ground. Gender classifications are subject to a different but similar analysis under the Constitution and Title VII of the United States Code.

B. Basic Constitutional Considerations.

Your question again recalls our previous expressions of concern that the City's equal opportunity policy must be applied in comportment with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As we have earlier advised in City Attorney Opinion No. 84-4 as well as in several subsequent Memoranda of Law (notably, those dated May 2, 1991 and December 7, 1989), the Equal Protection Clause imposes clear limitations on the application of non-federal affirmative action programs. Programs applying racial preferences will draw strict judicial scrutiny if challenged and will only be sustained by the courts if the state or political subdivision applying them can establish a "compelling interest" in the program based on articulable findings of past discrimination. Even then, a plan must be narrowly tailored so as to limit effect to the redress of the specific injuries shown by those findings. Richmond v. Croson Co., 488 U.S. 469, 102 L. Ed. 2d 854 (1989).

Since the City has not made any such findings, its EOCP purposely avoids use of the term "affirmative action," which connotes race conscious preferences, and instead employs the neutral term "equal opportunity." Thus, the reference in Council Policy No. 300-7 to the City's "Affirmative Action Program" is mistaken, as the policy actually pertains to the EOCP. See, City Council Resolution No. R-262633, adopting City Manager Report No. 85-37 (1985) and the recommendations it contains with respect to the MBE/WBE Program and the revised Equal Opportunity Program for Non-Construction Contractors.

As noted in section IIA of that report, "the title has been changed from 'Affirmative Action Program for Contractors' to 'Equal Opportunity Program . . . .'" The distinction in terminology is important because the City has every right, and in fact has a duty, to make its business equally available to minorities and, to ensure that its contractors do not discriminate. Under the present program, the City has sought legitimately to "level the playing field" by attempting to eliminate artificial barriers, by insisting upon extension of equal opportunity to minority and women businesses, and by refusing to transact with those who do not so abide. In construction contracts, this objective has been pursued by rejecting all bids when the low bidder does not make a good faith effort to meet MBE/WBE goals.F

See, discussion of Pataula Electric Membership Corp. v. Whitworth on page 9 for an update on the continued legal viability of this policy.

However, the program does not permit accepting the next lowest bid in compliance with the program, as this would be a literal "affirmative action" for which the Equal Protection Clause demands supporting evidence. In consulting contracts, inclusion of race considerations in the actual selection criteria amounts to such an "affirmative action."

As noted in Memorandum of Law dated May 2, 1991 at page 7, the City's EOCP "is carefully drafted to avoid using racial or gender based criteria in the awarding of a bid by merely rejecting all bids when the lowest responsible bidder fails to at least make a good faith effort to reach the goals of the program." This comment was made in reference to construction contracts where the law (San Diego City Charter section 94) requires award to lowest responsible bidders, but the legal essence of equal protection indubitably extends to consulting contracts as well. It is not the underlying subject of the contract that triggers strict scrutiny, but the application of race classifications. Therefore, we perceive a constitutional problem in the present City EOCP practice of including weighted MBE/WBE consideration in the criteria upon which consulting contracts are awarded. For illustration: Consultant A submits a proposal which, without consideration of the MBE/WBE criterion, is scored superior to that of Consultant B; but B's proposal rates higher when the MBE/WBE weighted criterion is considered. Unless there exist

specific findings to support use of the racially based criterion, A's Equal Protection right almost certainly would be held violated if A challenged the award of the contract to B. This is because the race-based criterion factors into the actual award of the contract, (and in this example makes the critical difference) without the support of findings which demonstrate a compelling need for such a preference in consideration.

C. Recent Case Developments

Recent cases from the Ninth Circuit Court of Appeals give particular instruction following the Croson decision. We review those cases here with attention to the two major analytical prongs of Croson: First, the requisite evidentiary foundation for showing a compelling interest in the use of any race classifications at all; and second, the guidelines for narrowly tailoring a program based on race classifications so that its effects do not exceed its limited remedial authority.

1. Compelling Interest in Use of Race Classifications

In Coral Const. Co. v. King County, 941 F.2d 910 (9th Cir. 1991) a contractor challenged King County's (an area which includes Seattle) application of an MBE/WBE program when a construction contract was awarded to an MBE which had bid higher than the plaintiff, but was favored under the race conscious program. The contractor has been largely unsuccessful in this suit because King County had developed some anecdotal evidence of past discrimination prior to applying its program to the contract at issue. After the contract was awarded to the MBE, and after the county had won summary judgment in district court, the county nevertheless amended its program to incorporate results of two consultant studies which provided statistical data that bolstered the anecdotal evidence of past discriminatory practice. (These studies, incidently, cost King County $411,000. Id. at 915.) The court repeated the rule that "before a city may embark on an affirmative action program, it must have convincing evidence that remedial action in warranted." Id. at 920 (citation omitted). At issue was the question whether the county had sufficient evidence of discrimination before it applied the MBE program to the particular contract in question. The court ruled that the anecdotal evidence alone was insufficient to ultimately legitimize the program, stating that "strict scrutiny demands a fuller story." Id. at 919. But the court held that the subsequently developed statistical data could be considered along with the anecdotes, setting a rule that "the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE." Id. at 920. The court did reverse the order of summary judgment to allow the plaintiff the opportunity to litigate the validity of the statistical data in district court, but what was significant to the county was the fact that evidence of that data would be admissible in the proceedings even though it was not in hand when the alleged equal protection violation occurred. What

we learn from Coral Construction then, is that some supporting evidence is required before a remedial program is applied; but in the end, if the application is challenged, both anecdotal and statistical data will ultimately be required to sustain the validity of the action under strict judicial scrutiny.

What is problematic about the inclusion of racial consideration in San Diego's consultant selection criteria is that the City has not, insofar as we are aware, developed any evidence of discrimination injuries in the local consultants' community. "A race-conscious remedy without a race-based injury is constitutionally infirm." Id. at 921, citing Croson, 488 U.S. at 499-502 (majority). "Without any evidence of discrimination, it cannot be fairly said that the state is seeking to 'remedy' a problem . . . thus any program adopted without some legitimate evidence of discrimination is presumptively invalid." Id. at 920.

In the Memorandum of Law dated May 2, 1991, we reported on a federal district court's refusal to enter a preliminary injunction against San Francisco's MBE program in Associated Gen. Contractors of Cal. v. City and County of San Francisco, 748 F. Supp. 1443 (N. Cal. 1990). The district court denied the request of a contractor's organization to enjoin the program at an early stage in the litigation because San Francisco had developed statistical and other information (before ordaining the program) which demonstrated a strong basis in evidence for the taking of corrective action. Predictably, the contractor's group appealed the district court's ruling to the Ninth Circuit Court of Appeals, which has since rendered a decision basically affirming the lower court. Associated Gen. Contractors of California v. City and County of San Francisco, 950 F.2d 1401 (9th Cir. 1991). The Court of Appeals cited the detailed findings of prior discrimination in construction and building trades within the city's borders. Id. at 1414-1415.

Most significant to the court's analysis was the testimony given to the San Francisco Board of Supervisors at more than ten public hearings held prior to enactment of the MBE ordinance; a statistical study commissioned by the city indicating the existence of large disparities between the award of city contracts to available non-minority businesses and to available MBEs; and, the record of individual anecdotes of discrimination which bring "the cold numbers convincingly to life." Id. at 1415, citing Coral Construction, 941 F.2d at 919. In sum, San Francisco has developed a record which indicates that it likely can demonstrate a "strong basis in evidence" for its decision to adopt a race conscious plan, and accordingly no injunction against that plan has been issued pending trial on the merits.

If the City decides to follow San Francisco and King County by undertaking a study of discrimination within its jurisdiction, we believe that several points should be first considered. First, such studies

often are quite costly. A 1990 survey of 44 major discrimination studies conducted by a minority legal advocacy group showed costs ranging from zero (for in-house studies) to $600,000, with $100,000 being called the "low end." The survey noted that local governments often experienced "sticker shock" when contracting such studies. Halligan, Minority Business Enterprises and Ad Hoc Hypotheses: Guidelines for Studies by Local Governments, 23 The Urban Lawyer 249, 250 (1991). Second, the City should consider the effects of its MBE program efforts over the past ten or so years, which doubtless have had measurable success in eliminating discrimination in the jurisdiction. Any study would necessarily entail factoring the equalizing effects the present program has achieved. And third, if the study did disclose redressable discrimination, those findings could become the subject of protracted and complex litigation. Witness San Francisco and King County. Despite the fact that their programs have withstood motions for preliminary injunction in the trial and appellate courts, the litigation for both has persisted for years and both cases are yet to go to trial.

One additional observation to be made when attempting to show a compelling interest in a remedial program is the extent to which the evidence of discrimination implicates local government itself. This is an important but not a determinative consideration. Both Coral Construction and Associated General Contractors emphasize that although the evidentiary foundation of a valid MBE program must show that local government was itself involved in the perpetuation of discrimination, the city need not prove that it was directly and actively contributing to that discrimination. It would be sufficient to show "passive participation, such as the infusion of tax dollars into a discriminatory industry." Coral Construction, 941 F.2d at 922, citing Croson, 488 U.S. at 492 (plurality opinion). In both of the appellate cases discussed here, the local agencies had evidence of contract discrimination within their geographic jurisdictions, and were able to show that public funds had to some extent flowed to businesses which fostered that discrimination.

2. Narrowly Tailored Remedial Program

Once local government has evidence that suggests that it has a compelling interest in implementing a remedial program, strict scrutiny also demands that the program be narrowly tailored to redress only that discrimination.

The Croson case identifies three indicia of a narrowly tailored program. First, an MBE program should be instituted either after, or in conjunction with, race neutral means of increasing minority business participation in public contracting. Id. 488 U.S. at 507. Second, a narrowly tailored program must be flexible in its minority participation goals, such that the goals are considerate of all circumstances and are set on a case-by-case basis rather than a rigid numerical basis, Id. at 507-508. Third, the program must be limited in its effective scope to the

boundaries of the enacting jurisdiction. Id. at 491-492 (plurality opinion). Both Coral Construction and Associated General Contractors address these concerns in scrutinizing the respective programs of King County and San Francisco.

Of special interest is the analysis of the third requirement (limited geographic scope) contained in the Coral Construction case. City Attorney Opinion No. 84-4, citing Fullilove v. Klutznick, 448 U.S. 448 (1980) observed a key distinction between the authority of the federal government, in contrast to the authority of state and local government, to redress past discrimination. The Coral Construction decision clearly acknowledges this distinction. "The joint lesson of Fullilove and Croson is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do." Id. at 925 (citation omitted). The importance of this distinction in authority was brought out in Coral Construction. There, King County's MBE program defined "minority business" as one which had been discriminated against "in the particular geographical areas in which it operates." This definition was held to be overly broad, and was viewed as one clear constitutional flaw in King County's program. Id. "The task of remedying society-wide discrimination rests exclusively with Congress." Id. citing Croson, 488 U.S. at 490. King County has no authority to attempt redressing the injuries of discrimination inflicted outside of its jurisdiction. "In order for an MBE to reap the benefits of a state or local MBE program, it is necessary to determine if the company has ever been victimized by discrimination within the particular state or local jurisdiction applying the program." Id. Coral Construction indicates that an MBE would be presumed eligible for relief if it had previously sought to do business in the county. But if the MBE was a newcomer to the local jurisdiction, or "otherwise was untarnished by the systemic discriminatory practices, then it may not benefit from the MBE program." Id. We note that San Diego's consultant selection MBE criteria make no attempt to discern whether an MBE has ever attempted to do business within the corporate boundaries of the City.

The other criteria for narrow tailoring are also briefly discussed in the Ninth Circuit cases. Flexibility is emphasized by both, each holding that the remedy should be applied as circumstances warrant rather than by a rigid numerical approach. Thus, a valid program should take into account, on a case-by-case basis, the number of qualified MBEs which are available. Also, the program "should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors." Coral Construction, 941 F.2d at 924. The court added that flexible procedures better insure that the beneficiaries of preferred treatment are truly those who have suffered discrimination in the locality. "Minority set-aside programs are not to

be windfalls for otherwise successful minority contractors who have either overcome or otherwise not felt the sting of discrimination in the relevant locality." Id.

It is this flexibility component of the narrow tailoring requirement that is most relevant to your question about varying MBE consultant selection criteria among City departments. If the EOCP had an adequate evidentiary predicate, the MBE criteria among departments should then be limited and conformed to that evidence as particularly as possible. What makes an answer to your question most difficult, however, is the lack of evidence to support the present criteria percentages. Your proposal to simply change the Clean Water Program MBE criterion to match that of the Engineering and Development Department, for the sake of uniformity and not because evidence suggests this to be a proper remedial measure, would only strengthen a precarious notion that the City's MBE goals are arbitrarily determined. Thus, the only legitimate advice we can give in response to your question is that weight of preference must be carefully limited to conform to the redress of specifically provable injuries which were inflicted within the City's geographic jurisdiction.

D. Damages for Violation of Federal Rights

In closing this discussion of the requirements of a valid MBE program, we should comment on potential liability that may attend an invalid program. Beyond seeking simply to have MBE programs declared unconstitutional and void, plaintiffs in recent reported cases have also sought damages under 42 U.S.C. Section 1983 for deprivation of federal rights under color of state law. This was true in the Coral Construction case, where the court held that the damages available under the federal statute could be recovered by the plaintiff if it could be proved that injuries were caused by the deprivation of constitutional rights. The question of causation was central to the analysis. Since the geographic scope component was the only aspect of the King County program which the court found unconstitutional, and because the record was unclear whether the MBE who won the contract had benefitted from that invalid component to the plaintiff's detriment, the matter was remanded to district court to permit the plaintiff to attempt to show this causation. The significant point, however, is that if a bidder can show that an injury resulted from the application of an unconstitutional program, local government may be found liable for damages under Section 1983.

A related concern was addressed in the recent Eleventh Circuit decision in Pataula Electric Membership Corp. v. Whitworth, 951 F.2d 1238 (11th Cir. 1991). Although that case did not involve a controversy over an MBE program, the court said that the Georgia procurement statutes and regulations give the low responsive, responsible bidder a property interest in the award of the contract that is protected by the Fourteenth Amendment's Due Process Clause. Thus, the constitutional analysis centered on due process rather than equal protection, the rationale being that the competitive bidding laws substantially confined the defendant

state officials' discretion to allow formation of a property interest which could not be denied without due process of law. The court found that the state's authority to reject "any and all bids" did not permit it to act in an arbitrary manner and discount the low bidder's property interest in violation of the Due Process Clause. This decision is not from the Ninth Circuit and is therefore not binding on the City, but it does serve as a precedent which the Ninth Circuit could adopt. Such an adoption would affect the City's present policy of rejecting all bids in construction contracts where low bidders fail to make good faith MBE efforts and could lead to damages in prior instances where the policy was applied.

We believe that these cases serve an important notice to the City of possible damage liability for the deprivation of constitutional rights under color of state law, whether such rights are of equal protection, due process, or both.

II. LOCAL FAMILIARITY.

The selection criteria of the Engineering and Development Department provides for up to ten (10) percentage points of overall consideration for the following: "The firm is familiar with the City and other local regulatory agencies, planning, and civic groups. The firm should explain how they plan to deal with the distance issue if located outside San Diego County."

An inquiry into the legality of this provision must take into account its purpose. The legality would be questionable if it were found that this provision aimed at local economic protection. "Municipal legislation discriminating against nonresident business in favor of resident business is unconstitutional." McQuillan, Municipal Corporations, Constitutionality of Ordinances, Section 19.16 at 439 (1969).

The constitutional bases for this conclusion are several. The Commerce Clause (U.S. Const. art. I, Section 8, cl. 3), the Privileges and Immunities Clause (U.S. Const. art. IV, Section 2, cl. 1), and the Equal Protection Clause (U.S. Const. amend. XIV, Section 1) are all possible grounds for challenge.

However, we believe that the particular provision at issue here would not be subject to successful attacks because it does not aim at local economic protection or establish a preference against non-local businesses. The concern for local familiarity is legitimate where the work under consideration could be more effectively performed by a consultant possessing that familiarity. Consulting often requires the ability to work with civic groups and regulatory agencies, and familiarity here translates to a degree of qualitative advantage. Similarly, the requirement that non-local competitors explain how they will "deal with the distance issue" addresses a legitimate concern. The criterion itself does not handicap non-local firms interested in City contracts, but merely seeks explanation of how the natural disadvantage

of remoteness will be addressed. So long as non-local proposals adequately address this concern, they could receive the same ten (10) percentage points of overall consideration that a local firm could get. Also, it is possible that even a local firm might have insufficient familiarity with local civic groups and regulatory agencies, and thus score low in this category. The point is, this criterion is relevant to the ability to satisfactorily perform the work. It applies to non-local and local firms alike, and there is nothing discriminatory in taking consideration of the consultants' local experience or their ready local availability, as these are factors which will bear on performance.

CONCLUSIONS

1. Your question about MBE weight in the consultant selection criteria cannot be legitimately answered without specific evidence of local discrimination which supports granting any racial preference at all. If such evidence is developed, the weight of preference should be narrowly tailored to match the evidence.

2. The local familiarity criterion of the Engineering & Development Department poses no legal problem because it concerns substantive qualifications and does not aim at local economic protection.

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