MEMORANDUM OF LAW

DATE: January 28, 1994

TO: Ernie Linares, Acting Equal Opportunity Contracting Program Manager

FROM: City Attorney

SUBJECT: Consultant Hiring Guidelines

In a memorandum dated January 5, 1994 directed to Deputy City Manager Bruce Herring and Chief Deputy City Attorney Ken So, you asked our office to review and comment upon proposed changes to contract documents related to consultant hiring guidelines. You also indicated that back in October, as a result of the preliminary injunction in Associated General Contractors of America, San Diego Chapter, Inc. v. City of San Diego, United States District Court, Southern District of California, Case No. 3-1152K, the Purchasing Department and the Office of the City Attorney collaborated to revise all the language associated with construction contract documents.

We have reviewed your memorandum and accompanying attachments and we have the following comments:

1. When City Council took action on November 29, 1993 to rescind Resolution No. R-262633 they effected a substantive change in policy to the Equal Opportunity Program. For that reason, even though the construction documents were modified in October after the preliminary injunction, we think it would be prudent for you to revisit the construction documents to ensure they are consistent with both the court order and the recent policy direction from City Council.

2. In our opinion, your recommended changes to contract documents related to the MBE/WBE Program are consistent with the Associated General Contractors ("AGC") judgment, applicable laws and recent policy direction from City Council.

3. All of the documents attached to your memorandum contain boiler plate provisions requiring contractors, lessees or developers to submit an Equal Opportunity Plan to the City if underrepresentations are identified by City staff after comparing Work Force Reports with County Labor Force Availability Statistics. Although this issue was not raised in the AGC case or before City Council on November 29, 1993, for the reasons

explained below we are concerned about inclusion of this language in the documents.

The legality of San Francisco's Equal Employment Opportunity ("EEO") Program was litigated in the case of Alioto's Fish Co. v. Human Rights Com. of San Francisco, 120 Cal. App. 3d 594 (1981). I have attached a full copy of that court opinion for your information and review. The Alioto case is still good law and was recognized recently as such by our own Fourth District Court of Appeal in Delaney v. Superior Fast Freight, 14 Cal. App. 4th 590 (1993).

The most important issue decided by the court in Alioto was the ruling that charter cities are not preempted by the Fair Employment and Housing Act ("FEHA") from inserting and enforcing nondiscrimination clauses in contracts. Alioto, 120 Cal. App. 3d at 605. The court viewed this practice as an exercise of charter city contracting power falling outside the scope of the police power measures embodied in the FEHA. Id.

Another important issue on appeal in Alioto related to the constitutionality of requiring lessees to enter into an annual Affirmative Action Agreement with San Francisco's Human Relations Commission ("HRC"). The HRC administers San Francisco's EEO Program and thus was named as the principal defendant in the Alioto case. HRC prevailed on this issue. However, the court made it quite clear that the reason the Affirmative Action Agreement component of the EEO Program survived constitutional scrutiny was because there was no evidence to suggest that HRC was compelling or requiring lessees to enter into the Affirmative Action Agreements. If HRC had been compelling those agreements without any concrete evidence or proof that the lessees had engaged in past discrimination in hiring or promotion practices, then the program would go beyond enforcement of nondiscrimination requirements and would be transformed into a pure "affirmative action" or "benign discrimination" program. As you know from the Richmond v. Croson Co., 488 U.S. 469 (1989) case, such a program is constitutionally problematic unless it can be can be demonstrated that it is narrowly tailored to redress past identifiable discriminatory practices on the part of the agency administering the program. In Alioto, the court was able to say that San Francisco's EEO Program was not an "affirmative action program" because voluntary adoption of the agreement was merely one of several alternative methods for the HRC to verify and for the lessee to produce evidence of compliance with the nondiscrimination requirements contained in the lease. Alioto, 120 Cal. App. 3d at 609.

One of the other verification measures built into San Francisco's ordinance which was recognized by the court is a

provision which, if invoked by HRC, requires lessees to answer a detailed questionnaire related to their recruitment, hiring and training practices. Another alternative built into the ordinance is a process similar to that found in State law which gives the Fair Employment and Housing Commission the authority and power to enforce State non-discrimination clauses in State contracts through an investigation and hearing process.

In light of the above referenced authority, it is our recommendation that with respect to the EEO Program you continue to require Work Force Reports in contracts, leases, RFP's and Developer Agreements. You clearly have the authority to collect this data. However, we suggest you modify boiler plate contract language so that Equal Opportunity Plans are voluntarily solicited from those the City does business with, and not required as a condition of maintaining a relationship with the City or required as a condition of receiving payments from the City. It might also be prudent to change the name of this document from "Equal Opportunity Plan" to "Equal Opportunity Agreement."

With increased public scrutiny and attention being directed toward the equal opportunity efforts of the City, it increases the probability that the current policy of requiring Equal Opportunity Plans could be challenged. Failure to make this change will expose the EEO Program to ongoing legal vulnerability. Bear in mind that making this change does not necessarily mean that the EEO Program must be weakened. Certain aspects of San Francisco's EEO Program are clearly more aggressive than ours and those provisions were approved by the court in Alioto.

Perhaps, the change we suggest could be implemented as part of a broader effort to strengthen our EEO Program. At the very least, we think this issue should be addressed as the interim program and the new program are developed.

Please call if you need further clarification of our comments.

JOHN W. WITT, City Attorney
By
Richard A. Duvernay
Deputy City Attorney

RAD:lc:820(x043.2)
Attachment
cc Bruce Herring, Deputy City Manager
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