MEMORANDUM OF LAW

DATE: March 13, 1995

TO: Councilmember Scott Harvey

FROM: City Attorney

SUBJECT: Proposed Equal Opportunity Ordinance

QUESTION PRESENTED

You have asked, citing the case Richmond v. Croson Co., 488 U.S. 854 (1989), whether the City's recently adopted Equal Opportunity Ordinance ("Ordinance") will survive a legal challenge?

CONCLUSION

As indicated in our previous Report to the Mayor and City Council on this subject, dated January 5, 1995, (enclosed as attachment 1) the greatest care was taken in drafting the Ordinance. We believe, based upon the current state of the law, that the Ordinance will withstand a legal challenge especially one based on Croson. However, as we cautioned in our previous report, the law in this area is in flux and may evolve such that the Ordinance does not survive a legal attack.

BACKGROUND

The City's Equal Opportunity Ordinance is directed at illegal discrimination in employment by contractors doing business with the City. Such discrimination is specifically prohibited by federal law under the auspices of Title VII of the Civil Rights Act of 1964 ("Title VII") and the California Fair Employment and Housing Act ("FEHA"), Government Code sections 12900 through 12996. The Ordinance grants the City the authority to ensure that contractors doing business with the City and receiving City funds comply with applicable federal and state employment laws. The Ordinance is thus very narrow in scope.

Recently, some members of the public have suggested that the Ordinance may violate the Fourteenth Amendment to the U.S. Constitution, and the applicable controlling case law. Specifically, the case most frequently cited as applicable is Richmond v. Croson Co., 488 U.S. 854 (1989). Members of the public have represented that the ordinance struck down by the Court in Croson is exactly the same as the City's Ordinance. These individuals maintain that, since the Ordinance is identical to the Richmond ordinance, it will not withstand a judicial challenge.

ANALYSIS

The Richmond ordinance and the City's Ordinance address two

distinctly separate areas of the public contracting arena. The ordinances are, therefore, very dissimilar. There are three major areas in which the two ordinances diverge. We will address each ordinance separately.

In the Croson case, the Richmond ordinance dealt only with the subcontracting aspect of Richmond's contracting program. "The Plan required prime contractors to whom the City awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs). The 30% set-aside did not apply to city contracts awarded to minority-owned prime contractors." Croson, 488 U.S. at 871.

The Richmond rules also allowed for waivers of the mandatory 30% set-aside only in very narrow circumstances. The rules provided in pertinent part:

> No partial or complete waiver of the foregoing 30% set-aside requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal.

Id. at 872.

Finally, the Richmond ordinance was deemed to be remedial. It was ostensibly enacted to correct past discrimination endemic to Richmond's construction industry. Id. at 872.

The City's Ordinance, on the other hand, is not remedial. Rather, it is addressed solely and specifically to preventing current or future illegal employment discrimination on the part of employers with whom the City contracts.

Illegal discrimination is prohibited by 42 U.S.C. Title VII, Section 2000e-2, which makes it an unlawful employment practice to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment on the basis of race, color, religion, sex or national origin. Similar provisions are found in the FEHA. The FEHA also extends its protection to medical condition and marital status. Government Code Section 13940. The City is thus not required to conduct business with any contractor who illegally discriminates. The Ordinance is a means of allowing the City to ensure that discrimination which contravenes the mandates of Title VII and the FEHA is not being practiced by contractors with whom the City does business.

Additionally, the Ordinance does not require set-asides, as the

Richmond ordinance did. Should the City determine that a contractor has a significant under-representation of any group, the Ordinance only requires that the contractor, with assistance from City staff, draft an equal opportunity plan which will set forth methods designed to address the under-representation. In drafting an equal opportunity plan, City staff will consider all factors which may impact the availability of individuals in under-represented groups. The Ordinance does not require, through the adoption of an equal opportunity plan, that a contractor achieve numerical equivalence with County labor force statistics. Rather, it ensures that contractors will make all reasonable efforts to assure the availability of employment opportunities to all individuals.

Finally, the Ordinance does not address subcontracting issues at all. No mandatory set-asides for subcontracts are required. In fact, the Ordinance does not require that a prime contractor sub-contract out any work. In that context most specifically, the Ordinance differs from the Croson case.

The two ordinances in question address entirely different areas of a public entity's contracting concerns. If a judicial challenge to the City's Ordinance is based on principles enunciated in Croson, as has been suggested, given the very different provisions of the ordinances, we believe the Ordinance will withstand such a challenge.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

SAM:mrh:581.3(x043.2)
Attachment 1
ML-95-19