MEMORANDUM OF LAW

DATE: February 6, 1996

TO: Debra Fischle-Faulk, Program Manager, Equal Opportunity Contracting Program

FROM: City Attorney

SUBJECT: Equal Employment Opportunity Ordinance

QUESTIONS PRESENTED

1. May the City's Equal Employment Opportunity ("EEO") Ordinance be implemented without running afoul of state and federal discrimination legislation.

2. If so, how will compliance be monitored?

SHORT ANSWERS

1. The EEO Ordinance may be implemented because it does not interfere with the administration of state or federal discrimination laws but, rather, complements them. Thus, it is not preempted by state or federal laws on the subject. Additionally, the EEO Ordinance affects only contractors who contract with the City of San Diego ("City") and the City has the power to prescribe nondiscriminatory contract provisions.

2. Prime contractors must provide to the City a Work Force Report or an Equal Opportunity Plan to be in compliance with the EEO Ordinance. Additionally, the implementing policies and procedures for the EEO Ordinance provide that prime contractors ensure compliance by their subcontractors by obtaining similar work force documentation. Through this mechanism, compliance by both the prime contractor and their subcontractors will be monitored by the Equal Opportunity Contracting Program ("EOCP") staff. Should the monitoring process reveal noncompliance by a prime contractor, either in its work force or in that of its subcontractor, the EOCP staff may then take the steps indicated in the EEO Ordinance to compel compliance or recommend termination of the contract.

ANALYSIS

I. Implementation

The issues surrounding the implementation of the ordinance are two: preemption and recordkeeping.

A. Preemption Issue

The primary concern facing the implementation of the ordinance is whether it is preempted by state or federal law.

At first blush, the Ordinance may appear to be preempted by both state and federal law. However, closer examination of the federal and state statutes shows the EEO Ordinance neither conflicts with nor duplicates state or federal law, but rather, enhances existing law by assuring compliance with those laws through the City's contracting powers.

With respect to federal law, the Civil Rights Act of 1964 (Title VII) regulates, among other things, vast portions of employment law without preempting state or local laws. Employment discrimination is covered specifically in 42 U.S.C. Sections 2000(e) through 2000(e)-17. It provides that:

> (a) Employer practices. It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. Section 2000(e)-2.

Although the statute regulates discrimination in employment at the federal level, it clearly envisions interaction with state laws. Specifically, Section 2000(e)-7 provides:

> Nothing in this title 42 USCS Sections 2000e et seq. shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title 42 USCS Sections 2000e et seq..

The Supreme Court has reiterated the interdependence of the state and federal employment discrimination laws and acknowledges that "state laws obviously play a significant role in the enforcement of

Title VII." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 101 (1983).

In California, the Fair Employment and Housing Act ("FEHA"), California Government Code sections 12700 through 12996, addresses, and explicitly preempts, discrimination in employment issues. It provides:

> It is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county or other political subdivision of the state . . . .

Cal. Gov't Code Section 12993(c).

Generally, local governments, especially charter cities like San Diego, may legislate upon matters of both local and statewide concern. However, under the preemption doctrine, local regulation of matters of statewide concern "remain subject to and controlled by applicable . . . state laws . . . if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation." Bishop v. City of San Jose, 1 Cal. 3d 56, 61-62 (1969); Cal. Const., art. XI, Section 7. It can be conceded that discrimination in employment and housing are matters of statewide concern. The language of the FEHA is unambiguous and indicates a clear intent on the part of the legislature to preempt the entire field of discrimination in employment issues.

Looking at the state and federal statutes as two independent yet interworking parts to a single complex statutory scheme, it appears the statutes prohibit a city from implementing an employment discrimination ordinance, even though the city's ordinance does not directly conflict with the state or federal statutes. The courts have indicated that: ". . . Conflicts exist if the ordinance duplicates citations omitted, contradicts citations omitted, or enters an area fully occupied by general law . . . ." People ex rel Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 484 (1984). The stated purpose of the EEO Ordinance, to prevent discrimination in employment, appears to be duplicative of provisions of state and federal law. Thus, the language of the Deukmejian case would appear to preclude enactment by the City of an ordinance to the extent that the ordinance purports to prohibit discrimination.

Even if the EEO Ordinance is not preempted on the grounds of duplication, it may nevertheless be preempted because it actually conflicts with state and federal law in certain areas. For example, both Title VII and the FEHA explicitly provide that only employers who employ over 100 persons must file an EEO-1 Employer Information Report or an adequate substitute. See FEHA, Title 2, Section 7287.0(a); 29 C.F.R. Section 1602.7. In contrast, the EEO Ordinance, San Diego Municipal Code ("SDMC") section 22.2703, implicitly requires contractors

and subcontractors who have more than fifteen (15) employees but less than a hundred (100) to comply with its report provisions. The ordinance appears on the surface, to conflict with state and federal law, however, a careful reading shows that it does not.

Having conceded that discrimination in employment and housing are matters of statewide concern, a narrow reading of the EEO Ordinance, which looks only at potential conflicts or duplication of state or federal statutes, would lead to the conclusion that the ordinance is preempted and, therefore, unenforceable. However, such a reading fails to distinguish the key purpose of the ordinance. Unlike Title VII and the FEHA, the EEO Ordinance does not legislate against discrimination. Rather, it ensures compliance with existing law through an exercise of the City's contracting power. The EEO Ordinance is not universally applicable to all businesses doing business in the City. It specifically applies only to contractors who enter into contractual agreements with the City. It is similar, therefore, to the leasing provisions in Alioto's Fish Co. v. Human Rights Com. of San Francisco, 120 Cal. App. 3d 594, 605 (1981), about which the court said, "the ordinance does not ban discrimination in employment but merely prescribes certain provisions in City contracts. Those who find such provisions burdensome may simply refuse to contract." Moreover, "in several opinions, the Attorney General has recognized that a local agency's insertion of nondiscrimination provisions in its contracts is an exercise of its contracting power which falls outside the scope of the police power measures embodied in FEPA."F

FEPA is the predecessor of the FEHA. It combined with the Rumford Fair Housing Act and the Health and Safety Code to form FEHA.

Id. at 605 (citations omitted).

The Attorney General has also opined that clauses which prohibit discrimination in employment may be inserted into public contracts because such clauses:

> Would be intended and designed to protect the school district from entering into a contract for or expending funds on a project executed in a manner contrary to the laws of the state. Such clauses constitute examples of the exercise by the local entity of its contracting power, a determination of the nature of the contractual obligations it may desire to enter into and a requirement which provides a remedy not for the injured employee but, instead, a remedy to the public agency for the special injury it suffers.

44 Ops. Att'y Gen. 65, 67 (1964); see also 60 Ops. Att'y Gen. 394, 397 (1977).

The City is, of course, not a school district. Nevertheless, the language of the Attorney General's opinion also refers to public agencies generally, and therefore includes cities in its analysis. The EEO Ordinance does not ban discrimination in employment generally, as do Title VII and the FEHA but rather, is an exercise of the City's contractual powers. As such, it is applicable only to contractors who wish to do business with the City, and is, therefore, not preempted by state or federal law. See Alioto's Fish Co., 120 Cal. App. 3d at 605.

B. Recordkeeping

Implementation of the EEO Ordinance should pose little concern for most contractors as it does not have onerous requirements which exceed federal or state law. Employers are required under both Title VII and the FEHA to collect and maintain employment information based on race and gender. Thus, the EEO Ordinance requirement that contractors provide a work force analysis does not impose additional requirements on contractors.

The federal recordkeeping provision, 29 C.F.R. Section 1602.7 (1994), provides as follows:

> Every employer that is subject to title VII of the Civil Rights Act of 1964, as amended, and that has 100 or more employees, shall file with the Commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO-1") in conformity with the directions set forth in the form and accompanying instructions. Notwithstanding the provisions of s 1602.14, every such employer shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent report filed for each such unit and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII.

Similarly, California Code of Regulations, title 2, section 7287.0 requires that certain records be kept:

> Employers and other covered entities are required to maintain certain relevant records of personnel actions. Each employer or other covered entity subject to this section shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent CEIR or appropriate substitute and applicant

identification records for each such unit and shall make them available upon request to any officer, agent, or employee of the Commission or Department.

California Code of Regulations, title 2, section 7287.0(b) goes on to state that "every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied." Such information may be used only for "recordkeeping purposes." This is the same information the EEO Ordinance requires in its work force analysis.

The CEIR referred to in the state regulation is the California Employee Information Record. California Code of Regulations, title 2, section 7287.0(a)(1) provides that an employer may substitute the appropriate federal report (EEO-I) in lieu of the CEIR if it chooses to do so. Having already gathered and collated the required information, contractors can simply provide the existing data to the City.

Based on the foregoing, the City may implement and enforce the EEO Ordinance as written because it is not preempted by state or federal law. The fact that state and federal law already provide recordkeeping provisions for information based on race and gender should make compliance by contractors a routine duty.

II. COMPLIANCE REQUIREMENTS

A. Prime Contractors

As currently written, the EEO Ordinance has minimal compliance requirements. Contractors are required to submit a work force report or, alternatively, an equal employment plan. Failure to provide the required documentation will result in the enforcement provisions of the Ordinance being invoked. Specifically, the EEO Ordinance ensures that an administrative hearing will be conducted if there is a failure to submit the required information. SDMC Section 22.2705(d). Prior to the hearing, the EOCP staff will recommend actions that may be taken by the contractor to correct any problems. The emphasis of the EOCP staff will be to reach a mutually beneficial resolution that results in a conciliation agreement between the City and the contractor. Pursuant to the EEO Ordinance, if no agreement is reached, a hearing will then be held to determine if the contract should be awarded despite a lack of compliance on the contractor's part. Alternatively, the hearing may result in a recommendation that the contract be terminated.

The EEO Ordinance also provides for periodic contract review by the EOCP staff. The review is to be conducted by the Program Manager to ensure that unlawful discrimination is not being practiced and that EEO plans are being implemented and adhered to as provided for in the EEO Ordinance. SDMC Section 22.2707. Should the review indicate that a contractor has failed to comply with the EEO Ordinance requirements, the City Manager may, after a hearing, terminate the contract. Under the ordinary terms of contract law a breach by a party of contract

provisions may be cause for termination of the remaining contract performance. Since the mandatory nondiscrimination clause is an essential provision of all City contracts, failure to comply with the terms of the clause is adequate cause for termination of the contract.

B. Subcontractors

The language in the Mandatory Nondiscrimination Clause ("clause") of the EEO Ordinance provides in pertinent part that "Prime Contractors shall ensure that their subcontractors comply with this program." SDMC Section 22.2704. It further provides that "nothing in this Section shall be interpreted to hold a prime contractor liable for any discriminatory practice of its subcontractors." SDMC Section 22.2704. On their face, these two sentences appear to negate one another. On the one hand, prime contractors are required to ensure that subcontractors comply with the program. On the other hand, the ordinance provides no enforcement mechanism to compel prime contractors to do so, or penalty for a failure to do so.

To reconcile this apparent inconsistency, we look to general rules of statutory construction for guidance. "As a general rule, courts apply the same rules of construction to municipal ordinances as they do to statutes." 1A Sutherland Stat. Const. Section 30.06 (5th ed.). With regard to interpreting statutes, the courts have said:

> "We begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." . . . In determining such intent "the court turns first to the words themselves for the answer." . . . We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." . . . "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose," . . . "a construction making some words surplusage is to be avoided." . . . "When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." . . . Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole . . . ."

Dalton v. East Bay Mun. Utility Dist., 18 Cal. App. 4th 1566, 1571 (1993), rev. denied, (citations omitted).

The job of the interpreter then, is to give effect to each word of

the ordinance in a manner that is consistent with ordinary usage. The first sentence of the clause at issue in SDMC section 22.2704 states that prime contractors shall ensure compliance with the program. Under rules of statutory construction, use of the word "shall" indicates the action is mandatory. Thus, the contractor is, in theory, compelled by the ordinance to ensure a subcontractor's compliance with the ordinance. How could this be accomplished? Since the ordinance itself gives no clear answer, and is, in fact, vague as to any enforcement mechanisms, the plain language of the ordinance does not sufficiently resolve the ambiguities. In such instances, we look again to rules of statutory construction for guidance.

In doing so, we learn that "reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." People v. Ali, 66 Cal. 2d 277, 280 (1967).

The City Council at the time of the adoption of the ordinance specifically considered and rejected the use of monetary penalties to ensure compliance. In fact, amendments to the original ordinance eliminated the existing monetary penalties. By this act, however, it may not be inferred that the City Council intended to enact an ordinance of no force or effect. The enforcement mechanisms must, therefore, be found within the implicit language of the ordinance in light of the surrounding circumstances. The courts have said "A statute will not be declared void as being indefinite if it contains 'a reasonably adequate disclosure of the legislative intent regarding the evil to be combatted in language giving fair notice of the practices to be avoided.'" Id.

The obvious purpose of the statute as a whole is to ensure compliance with existing state and federal discrimination laws through the exercise of the City's contracting power. An enforcement mechanism is necessary to fulfill that purpose. Because the clause in question is a mandatory clause, to be included in every contract, it may reasonably be inferred that the City Council intended that contract remedies be used, up to and including termination, to ensure compliance. For example, contract remedies could include damages, modification or alteration of the contract, or debarment from bidding on future contracts. To interpret the phrase to preclude termination of the contract would ignore the dictate that statutes be interpreted so that "the various parts of a statute must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole . . . ." Dalton, 18 Cal. App. 4th at 1571.

We believe this interpretation gives effect to the intent and purpose of the EEO Ordinance pursuant to City Council intent. Under this interpretation, the City may terminate the contract of a prime contractor who does not take steps to obtain a Work Force Report from its subcontractor or, alternatively, an Equal Employment Opportunity

Plan and ensure compliance with the plan if necessary. The EEO Ordinance permits such action. By giving effect to the City Council intent and interpreting the clause to allow the City to terminate its contract with the prime contractor, each sentence of the EEO Ordinance may be given effect as required by general statutory construction. Compliance may then be insured by the terms of the ordinance itself.

CONCLUSION

The EEO Ordinance may be implemented without running afoul of state or federal discrimination laws. The EEO Ordinance allows the City to monitor the employment practices of its contractors and their subcontractors and ensure compliance with existing state and federal law. If the City determines that a Work Force Report reflects low representation by women and minorities, it can require an Equal Employment Opportunity Plan be provided to the City. Review by the EOCP staff will monitor contractors' compliance with the plan to the extent necessary. Failure to meet the mandates of the EEO Ordinance may result in rescission of the contract.

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