

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: February 27, 2012

TO: Debra Fischle-Faulk, Department Director, Administration Department

FROM: City Attorney

SUBJECT: Increasing Limit of Restricted Small and Local Business Enterprise Competition for Construction Projects

BACKGROUND

This Office has previously analyzed the legal options available for establishing a small or local business preference program. See City Att’y Report RC-2009-9 (May 20, 2009); City Att’y Report RC-2003-12 (April 28, 2003). As discussed in these reports, the San Diego City Charter requires the City to award construction contracts to the “lowest responsible and reliable bidder” only if the contract exceeds a sum established by ordinance. San Diego Charter § 94. As one option, the reports concluded that the City Council may, by ordinance, amend the Municipal Code to set caps for a restricted competition program for construction projects within certain dollar amounts. See RC-2009-9, at 3-6.

In 2010, the Council approved the Small and Local Business Ordinance amending San Diego Municipal Code sections 22.3601 through 22.3622 which previously set forth components of the Minor Construction Program (MCP). Established in 2002, the MCP required “minor public works,” i.e., construction contracts valued at \$250,000 and under, to be bid out to a closed universe of small and emerging businesses who were participants of the program. Among other changes, the Small Local Business Enterprise (SLBE) Ordinance increased the MPC cap for restricting competition for minor public works contracts from \$250,000 to \$500,000. San Diego Municipal Code section 22.3611 states that public works contracts valued at more than \$250,000 but less than or equal to \$500,000 shall be open only to SLBE or Emerging Local Business

Enterprise (ELBE) certified firms and that the award shall be made to the lowest responsible and reliable SLBE or ELBE bidder.

The City is now proposing to enhance the SLBE program. One of the proposals is to increase the limit of restricted SLBE competition for construction projects from \$500,000 to \$1 million. This office has been asked to analyze this proposed increase.

ANALYSIS

In an effort to enhance the SLBE program, the City may consider increasing the restricted competition cap once again from \$500,000 to \$1 million if the City confirms that such an increase will further the purposes of the SLBE program. Given the authority granted in San Diego Charter section 94, the Council may increase that restricted competition limit by ordinance. There is no set dollar amount for which the restricted competition cannot exceed. However, the higher the City increases the limit, the more it subjects the SLBE program's restricted competition to possible legal challenge.

In the event of a challenge, a court would apply a rational basis review to determine the appropriateness of the increased cap. In *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 942-944 (9th Cir. 1987), abrogated in part by *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), a contractors' association challenged the City of San Francisco's ability to give bid preferences to local businesses as a violation of the federal equal protection clause. The Court held that the local business preference did not violate the equal protection clause because there were legitimate reasons for establishing the preference. It was also noted that the ordinance did not excessively favor the local businesses nor did it discriminate against nonresident businesses solely because they were nonresidents. Rather, it was designed to lighten the burden of local San Francisco businesses facing higher administrative costs associated with doing business in the City of San Francisco, as well as pursue a legitimate governmental interest to encourage businesses to move into the jurisdiction. *Id.* at 943. However, the Court goes on to clarify that "legitimate ends are tainted if they are pursued by illegitimate or excessive means" and found San Francisco's preferences to be "measured and appropriate" for its circumstances. *Id.*

To meet the legitimacy standard under *Associated General Contractors*, the Council's intent in enacting the SLBE Ordinance is to "create programs intended to enhance diversity in City contracts, increase competition, and stimulate the local economy by providing opportunities to small and local businesses." SDMC § 22.3601. Therefore, before increasing the threshold from \$500,000 to \$1 million, the Council should ensure that the record contains a legitimate factual basis to increase the threshold. Factors City staff can present to the Council for consideration include:

1. the number of public works contracts that fall below the proposed threshold;
2. the number of SLBE firms qualified to bid on projects up to \$1 million;

3. the administrative costs associated with doing business in the City of San Diego compared to nonresident businesses;
4. City efforts to encourage outside businesses to relocate to the City of San Diego;
5. evidence that the existing limit is too low to make the impact the City was seeking when it implemented the program; and
6. any other evidence showing the disadvantages facing San Diego small and local businesses.

The purpose of this analysis is to substantiate that increasing the restricted competition threshold is reasonably related to legitimate interests of the City.

CONCLUSION

The City may consider increasing the restricted competition program limits for construction projects from \$500,000 to \$1 million. However, the Council should first consider the effect of raising the threshold and confirm it will advance the purposes of the SLBE program. This will ensure that the City has a record of the legitimate factual basis to support the increase.

JAN I. GOLDSMITH, CITY ATTORNEY,

By

/s/ Nooria Faizi
Deputy City Attorney

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