



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: October 5, 2007 REPORT NO. 07-156
ATTENTION: Rules, Open Government and Intergovernmental Relations Committee
Agenda of October 10, 2007
SUBJECT: Equal Opportunity Contracting Program
REFERENCE: Actions for August 1, 2007 Rules Committee

REQUESTED ACTION:

Accept the report and docket a follow up report for January 2008.

STAFF RECOMMENDATION:

Accept the report. Docket follow up report for January 2008.

SUMMARY:

At the August 1, 2007 Rules Committee meeting, a report was provided regarding the City's Equal Opportunity Contracting Program. The Mayor prefaced the report with his commitment to the Equal Opportunity Contracting Program and will ensure that all residents have a fair and equal opportunity to bid and receive contracts with the City.

This report updates the Mayor's Action Plan, details actions taken to date (Attachment A) and specifically addresses information items requested during the August 1, 2007 Rules Committee meeting. Staff is recommending that another follow up report be docketed for January 2008.

Mayoral Equal Opportunity Task Force

On August 3, 2007, Mayor Sanders formed the Equal Opportunity Task Force comprised of key City staff members who are charged with implementing the recommendations from the August 1, 2007 Rules meeting. In addition, it is the duty of this group to work with the City Council, members of City Council's staff, the IBA, the community and the Citizens Equal Opportunity Commission (CEOC) to improve the City's Equal Opportunity Contracting (EOC) program to address the critical shortcomings detailed in the last report to the Rules Committee. The Task Force is dedicated to planning, evaluating and executing plans and programs designed to create, attract and retain a diverse business base to compete and be awarded contracts with the City of San Diego in all areas of Purchasing & Contracting.

Citizens Equal Opportunity Commission (CEOC)

The Citizens Equal Opportunity Commission (CEOC), an advisory committee, appointed by the Mayor and confirmed by the City Council, has taken a more active role in assisting the Mayor with improving the City's performance with ensuring equal opportunity in City contracts.

During their September 13, 2007 meeting, Commission members reviewed the current municipal code governing their roles and responsibilities and recommended staff and the CEOC adhere to the municipal code and work closer in the future to develop programs for the City. The CEOC is an eleven member panel. Currently, the Mayors office is seeking to fill four vacancies and one replacement for a member whose term has ended. Staff has sought nominations for these seats from the community and members of the City Council. It is expected that the appointments and reappointments should occur toward the end of October 2007. The available member seats include: one At-Large, one African American, one Asian/Pacific Islander, one Filipino and one Lesbian Gay Bi-sexual Transgender (LGBT).

Equal Opportunity Summit

An Equal Opportunity Summit, sponsored by the Mayor and hosted by the CEOC, was held August 28, 2007. The purpose of this summit was to reaffirm the Mayor's commitment to significantly improve local small business participation on City of San Diego contracts. Attendees were from diverse professional and ethnic backgrounds who provided feedback on the City's equal opportunity contracting program. Attachment B includes the agenda and list of attendees. Many ideas and suggestions were discussed which require further discussion and analysis. The CEOC plans to continue the dialogue and host follow-up meetings.

Other Agency Program Reviews

A best practices survey (Attachment C) was developed and forwarded to twelve California based public agencies to identify successful equal opportunity contracting program models. Five completed survey responses have been received to date (San Diego County Water Authority, Los Angeles Metropolitan Water Authority, Port of San Diego, City of Oakland and the City of Sacramento). A response from the County of San Diego was received, however, rather than completing the survey, they chose to forward the Board of Supervisors Policy statement. Additional follow-up will be conducted to encourage remaining agencies to respond. Once the responses are received, staff anticipates additional follow up to gather more detailed information--especially in the area of compliance and monitoring.

Non-Prevailing Wage Contract Compliance

At the end of the Engineering and Capital Projects BPR process, the responsibility for monitoring compliance for non-prevailing wage contracts shifted from that department to Purchasing and Contracting. This shift has resulted in 2 positions moving from Engineering and Capital Projects to Purchasing and Contracting. Interviews will soon be held and it is expected that these positions will be filled by November 2007. It is the intention of Purchasing and Contracting to begin audits of non-prevailing wage contracts when these positions are staffed.

Specific Responses to Recommendations from August 1, 2007

The following represents responses to the Rules Committee's requests for information at the August 1, 2007 meeting:

Item 1: Review and prepare a response to City Attorney's Memorandum of Law regarding the issues surrounding the Equal Opportunity Contracting Program.

During the August 1, 2007 hearing, the City Attorney's Office was asked to prepare a legal analysis of existing programs and provide recommendations. They were to take into consideration recent developments in case law concerning Proposition 209, particularly *Coral Construction, Inc v. City and County of San Francisco*, 149 Cal. App. 4th 1218 (2007) and federal equal protection principles. On September 10, 2007, the City Attorney delivered an "Overview of Law Concerning Equal Opportunity in Contracting: Existing Programs and Recommendations." (Attachment D)

In review of this Memorandum of Law, there were four questions raised:

- 1) Based on the data currently available, is there a historical pattern of discrimination in contracting at the City of San Diego that rises to the level of that contemplated by the ruling in *Coral Construction*?
- 2) If the data currently available is insufficient upon which to draw a conclusion, what data should be collected?
- 3) How might the drop in minority and female contractor participation since the implementation of Proposition 209 and the elimination of the City's outreach and preference programs be relevant to this analysis?
- 4) Assuming San Diego falls within the parameters of *Coral Construction*, how would the City Attorney advise the Council and the Mayor to proceed with reinstating outreach and preference programs so as to maximize the likelihood they will withstand a legal challenge based upon Proposition 209?

Upon their legal analysis, the City Attorney provided the following answers to these questions:

- 1) While the data currently available shows alarming disparities in City contracting, more information is needed to determine whether the City's contracting practices would be found to include discrimination that makes race/gender-based measures constitutionally necessary under *Coral Construction*.
- 2) In order to determine whether there is evidence of discrimination necessitating race/gender-based remedies under *Coral Construction*, the City should commission a new disparity study, or at least to supplement currently available data, to assess current marketplace realities, availability of minority and women-owned enterprises, and utilization rates.

- 3) The post-Proposition 209 drop in participation rates is relevant to this analysis, as it shows that race/gender-neutral alternatives have *not been effective* to remedy discrimination in San Diego public contracting.
- 4) The City would best insulate itself from legal challenge to newly instituted race/gender-conscious preference and/or outreach programs by supplementing current data with a new disparity study, or at least, current statistics comparing actual utilization to the availability of minority and woman-owned enterprises in targeted industries, and basing any new race/gender-conscious programs on such data.

Purchasing & Contracting is analyzing its options based upon the City Attorney's response. Specifically, staff is considering the optimal use of resources in prioritizing additional data collection, analysis, and policy development to enhance opportunities for minority and women business enterprise participation in City contracts. As the City Attorney has indicated, further court rulings may be forthcoming in the Coral Construction case in the near future. Therefore, the consultant Franklin Lee has proposed, and the Mayor's Task Force agrees, "it is prudent to hold off, for now, undertaking a full-fledged disparity study to determine the extent to which the City may be an active participant in marketplace discrimination under the present legal guidelines."

Given the challenges currently confronting the City in producing timely and accurate data on M/WBE availability, utilization, and disparity by industry, the Purchasing & Contracting Department will provide coordination and collaborate with the Task Force to immediately begin development of a mandatory, automated, on-line centralized bidder registration system for all bidders, contractors, subcontractors and vendors. This system will provide the necessary infrastructure that will enable the City to accurately measure such availability, utilization, and disparity in a very timely and cost-effective manner going forward. In the event the final court rulings in Coral Construction then warrant an updated disparity study to determine the extent to which the City is legally justified in applying race-conscious remedies to its contracting procedures, the quality of the City's data will be far superior for such purposes, and the cost of such a disparity study should be significantly reduced. In addition, the centralized bidder registration system will greatly assist staff's immediate efforts to more aggressively and more efficiently conduct outreach to all segments of the business community for bidding opportunities, and to identify those market segments where there is a strong need for enhanced competition and capacity development among small and local businesses (including minority- and women-owned firms). Moreover, pending further rulings in the Coral Construction case, staff will immediately follow the City Attorney's recommendations for strengthening the administration of the SCOPE program and implementation of more aggressive race-neutral policies to enhance the participation of small disadvantaged businesses.

Consultant Franklin Lee has been retained to draft policies to establish prime contract and subcontract preferences for the City's Small Local Business Enterprises, to enhance access to capital for such firms, and to facilitate new capacity in industry segments where minority- and women-owned businesses have been particularly scarce. Independent analysis will also identify barriers in the City's procurement policies and practices that disproportionately adversely affect the participation of M/WBEs. Additional resources will focus on analysis of the causes of the apparent reduced availability of African American bidders, the low bid rates, and low utilization of M/WBEs since the enactment of Proposition 209. Recommendations for appropriate reforms will then be implemented. These initiatives are considered high priority.

Item 2: Provide a status on the audit of the Equal Opportunity Contracting Program's compliance with federal regulations by the Audit Committee.

The Equal Opportunity Contracting Program is responsible for reviewing the participation levels on all city construction contracts and performs audits on Federally funded contracts, prevailing wage contracts and non-prevailing wage contracts for compliance, under the specific rules governing each type of contract. The Federal Government periodically audits how well the EOC performs these responsibilities. Since October 2006 to present, the Federal Government has audited the program several times on specific contracts and the program has passed all audits. In addition, the EOC has been audited by the outside auditor Macias, Geni & O'Connell, hired to perform these audits from the Kroll Report. The program has been assured of a favorable audit, and is awaiting the final written results.

An initial presentation for October 15, 2007 has been set with the City's Audit Committee to begin a review and audit of the program. Staff will commit resources and necessary support to perform the upcoming audit.

Item 3: Provide information and a proposal to amend the Municipal Code to reduce the dollar amount of contracts requiring City Council approval.

The City of San Diego's Charter Section 35 gives responsibility to the Purchasing Agent to "make all purchases of supplies, materials, equipment, and insurance for City Departments, and shall review, execute and house all consultant contracts. In addition, within Municipal Code Chapter II, Divisions 5, 8, 30, 3 - Purchasing authority resides with the Purchasing Agent. The rules and procedures of public procurement are outlined in various administrative regulations. The emphasis is on a fair and competitive process, with an openness regarding the final award. There is also a protest period and procedures, after the contract award. Specific directions provided in additional Municipal Code sections state the level of authority for contract award as follows:

Type of Purchase	Award by City Council	Municipal Code
Commodities and Services	> \$1,000,000	Section 22.3211
Consultants	> \$250,000	Section 22.3223
Construction	> \$1,000,000	Section 22-3102

Additionally, pursuant to Municipal Code Section 22.3003 and 22.3102b all public works contracts valued at \$250,000 or more that do not meet the criteria of section 22.3102 are currently required to be authorized by Council.

Item 4: Provide a report on all companies who received contracts under \$250,000.

Attachment E is a report of all the contracts for commodities, services, consultants, and construction, under \$250,000, awarded in FY07 and the beginning of FY08.

Item 5: Provide information regarding the performance of Redevelopment Agency, Centre City Development Corporation and Southeastern Economic Development Corporation related to EOC program.

The Redevelopment Agency of the City of San Diego was created by the City Council in 1958 to alleviate conditions of blight in older, urban areas. Although the Redevelopment Agency is a separate, legal entity, the City Council serves as its legislative body. The Mayor chairs the Agency, and the City Attorney serves as general counsel. The Redevelopment Division of the City Planning & Community Investment serves as staff to the Agency. Staff also coordinates the activities of the Agency's two public, nonprofit corporations, Centre City Development Corp. (CCDC) and Southeastern Economic Development Corp. (SEDC). The Redevelopment Agency does not track these statistics.

Centre City Development Corporation (CCDC) is a public, non-profit corporation created by the City of San Diego to staff and implement downtown redevelopment projects and programs. Formed in 1975, the corporation serves on behalf of the San Diego Redevelopment Agency as the catalyst for public-private partnerships to facilitate redevelopment projects adopted pursuant to redevelopment law. In FY2006, CCDC construction projects were predominantly development agreements for vertical construction (building) projects. It should be noted that the rationale used to determine ethnicity and gender of the contract awardees differ between CCDC and the City of San Diego. CCDC uses a combination of self certification, Small business Enterprise Standards and CalTrans Certification. CCDC had no public works awards.

Southeastern Economic Development Corporation (SEDC) is a public benefit corporation responsible for all redevelopment activities within a 7-square-mile area immediately east of downtown San Diego. SEDC does not track these statistics.

In addition to these three redevelopment agencies, EOC staff also contacted the Housing Commission, San Diego Convention Center, and San Diego Data Processing Corporation. These agencies have varying methods of tracking and reporting.

In order to ensure agency projects are included in programmatic enhancements, EOC staff will institute semi-annual agency reporting and conduct monthly coordination/collaboration meetings to review and discuss current agency practices/policies, programmatic enhancements and participation in both the mentor protégé and minor construction programs. The agencies to be included are: Redevelopment (City, CCDC, SEDC), Housing Commission, Convention Center and San Diego Data Processing. The first meeting is scheduled for Tuesday, October 30, 2007 at 10:00 a.m. After these series of meetings, for the January 2008 report, a table will be provided of these various agencies with a direct comparison.

Item 6: Engage the services of an outside consultant to assist in review and development of the Equal Opportunity Contracting Program.

The City will enter into a contract with Tydings & Rosenberg LLP from Baltimore Maryland to help with procurement reform and MBE/WBE availability and utilization statistics. Mr. Franklin M. Lee, from Tydings & Rosenberg, will be working on this project exclusively and is extensively qualified in public contracting litigation, program/policy development as well as possessing national and local San Diego experience. Attachment F provides a summary of his qualifications and the scope of work for this contract.

The results of the twelve agency survey, the IBA's survey, recommendations from the Equal Opportunity Contracting Summit and recommendations received from participants in the Mentor Protégé program will be provided to our consultant for review, analysis and inclusion, where possible, in programmatic enhancements/policy development.

FISCAL CONSIDERATIONS:

Consultant contract with Tydings & Rosenberg LLP for \$66,000 plus travel of \$7,500.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:


On August 1, 2006, the Rules, Open Government and Intergovernmental Relations Committee of the City Council received an informational report on the current status of EOC in the City of San Diego. That report resulted in the recommendations outlined above.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:


The CEOC meets monthly on the first Wednesday of each month at 6:00 pm in City Administration Building, 12th floor. The first of what will be several EOC Summit meetings has been held with members of the business community. Staff has sent a survey to a variety of jurisdictions to assess best practices. From the results of that survey, follow up calls will be made to gather more detailed information.

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

It is the Mayor's intent to improve the methods by which the City of San Diego solicits bids and award contracts to all segments of the San Diego business community. Key stakeholders include members of the business community and San Diego taxpayers.



Tammy Rimes
Purchasing & Contracting Department



Jay Goldstone
Chief Operating Officer

Attachments:

- Attachment A: Action Plan Timeline
- Attachment B: Summit Agenda and List of Attendees
- Attachment C: Survey
- Attachment D: Memorandum of Law
- Attachment E: Report on Contracts Under \$250K
- Attachment F: Qualifications and Scope of Work – Franklin Lee