



THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: April 10, 2012 REPORT NO. 12-041

ATTENTION: Rules, Open Government and Intergovernmental Relations Committee Meeting of April 18, 2012

SUBJECT: Small Local Business Enterprise (SLBE) Programmatic Review and Potential Enhancements

REFERENCE: Small Local Business Enterprise Program Implementation Document

REQUESTED ACTION:

None. Informational Update.

BACKGROUND:

In January 2010, the Mayor and City Council approved a Small Local Business Enterprise Program. The Program was designed in part to provide a race-and gender-neutral tool for the City to use in its efforts to ensure that all segments of its local business community have a reasonable and significant opportunity to participate in City contracts. It applies to construction, A&E consultant and goods/services contracts.

The Program was implemented July, 2010 and included a commitment to regularly evaluate the progress of the Program using accumulated availability and utilization data to determine specific program provisions that require modification, expansion, and/or curtailment. This report has been prepared to follow through with our commitment.

SUMMARY

Staff has identified several potential programmatic improvements to further research and obtain stakeholder feedback on that may enhance contract opportunities, address barriers and further the City's commitment to small local businesses.

In its first full year of implementation, the participation levels of certified firms significantly increased in construction. During FY2011, City certified Small and/or Emerging Local Business Enterprises (SLBE/ELBE) were awarded 12.9% (\$18.6 million) of the total construction dollars. Taking into account all other City recognized certifications (i.e. Disadvantaged,

Minority, Woman, Disabled Veteran, etc.), the percentage increases to 16.4% (\$23.5 million). Prior to the implementation of this program, City recognized certified firms were awarded 4.4% in FY2010 and 3% in FY2009.

A&E Consultant contract awards experienced a decline in FY2011 and fell short of the 20% SLBE/ELBE goal. City certified SLBE/ELBE firms were awarded 3.1% (\$1.83 million) with awards to all City recognized certifications (includes Disadvantage, Minority, Woman and Disabled Veteran owned firms) totaling \$9 million or 15.4%.

Restricted Competition - Construction

The increase in dollars awarded is due, in part, to the “Minor Public Works” component of the Program which provides restricted competition to SLBE/ELBE firms on construction projects valued at \$500,000 and below. SLBE/ELBE firms competitively bid for City prime contracts. The chart below provides numeric details of the FY2011 restricted competition projects:

Total No. of Contracts Awarded	No. of Restricted Contracts Awarded*	Total Dollars Awarded	Total Dollars Awarded to SLBE/ELBEs	Dollar Value of Restricted Contract Awards*	Percent of Dollars Awarded to SLBE/ELBEs
112 100%	34 30%	\$143,884,496 100%	\$18,664,900 12.9%	\$7,064,325 4.9%	37.9%

*Correction to numbers reported in Report #11-126

Of the \$18.6 million awarded to SLBE/ELBE firms, over \$7 million (37.9%) were direct City contracts through restricted competition. In addition, all bids were lower than the engineer’s estimate. These SLBE/ELBE prime contract opportunities assist the City with achieving the objective of: providing additional avenues for the development of new capacity and sources of competition for City contracts from a growing pool of small and locally based businesses as outlined in the Program.

Potential Improvement: Raise the limit of restricted competition projects. Please see the attached City Attorney Opinion which identifies legal issues requiring further analysis.

Restricted Competition – A&E Consultants

A restricted competition program for A&E consultants was implemented in August 2011 for which the design/engineering services were estimated to cost \$25,000 and below. Departments hiring an A&E Consultant for professional services must contact, solicit a proposal from and consider for award, a minimum of one (1) firm from the City’s approved SLBE list. This requirement is waived if there are no qualified firms on the list. It is the Project Manager’s responsibility to select a firm from the SLBE/ELBE list or to obtain a written waiver from EOCP. Results of this effort will be provided in our annual report. A key to the success of this program is to ensure an appropriate number of projects are available at this dollar amount. We will continue to monitor progress in this area.

Potential Improvement: Public Works Engineering & Capital Projects to focus on creating additional small contract opportunities for consultants similar to efforts with construction contracts.

Good Faith Effort Documentation

Major Public Works projects (\$1M and above) include on a contract-by-contract basis, mandatory subcontractor participation requirements for SLBEs and ELBEs. Prime bidders must achieve the mandatory subcontractor participation requirement or demonstrate a "good faith effort". "Good faith effort" is an implied contractual term and it is defined as "what a reasonable person would determine is a diligent and honest effort under the same set of facts or circumstances." *Troutt v. City of Lawrence*, 2008 U.S. Dist. LEXIS 61641 (S.D. Ind. Aug. 8, 2008). The City's guidelines for demonstrating good faith were initially based on the federal government's good faith effort requirements in an effort to provide consistency. These guidelines were subsequently modified under the guidance of the City Attorney's Office to address industry concerns regarding subjectivity.

Since that time, the industry raised additional concerns and staff convened a cross sectional focus group to review the requirements and obtain feedback. Staff recorded the feedback, analyzed the intent of good faith efforts and developed refinements. These refinements have been reviewed by the City Attorney's Office and will be presented at various stakeholder meetings for final recommendations.

Potential Improvement: Refine requirements of good faith effort requirements for low bid construction projects.

Goals

The Goal Setting Committee is a subcommittee of the Capital Improvement Program Review and Advisory Committee (CIPRAC) of which the Director of Administration is a member. This group establishes an annual CIP SLBE/ELBE goal based on the overall availability of firms and the types of projects anticipated. The first year of the Program, a 5% goal was established based on a very low availability base. For FY2012, the goal is 15% which was determined based on the increased number of certified firms, and the types and delivery methods of anticipated projects. In addition, Public Works staff establishes contract by contract goals utilizing the Caltrans goal development methodology. The methodology used is:

- A. NAICS codes of work categories included in project and percentage
- B. Total number of businesses in the market area (San Diego County) by NAICS codes
- C. Total number of certified SLBE/ELBEs by NAICS codes
- D. Percentage

The formula is:
$$\left[\frac{\text{No. of SLBE/ELBEs in a Work Category} \times \text{Weight}}{\sum \text{No. of all Firms in same Work Category}} \right] \times 100$$

The top number of the formula is based on the ready, willing and able firms who have expressed interest in doing business with the City by completing and submitting applications for certifications. The weight is calculated by dividing the dollar amount of the individual NAICS code by the total dollar amount of the estimate. Goals are developed objectively on a contract-by-contract basis and reviewed/approved by Equal Opportunity Contracting Program management staff.

Potential Improvements: 1) Establish contract-by-contract mandatory goals on all best value projects (i.e. Design/Build; Construction Manager at Risk, consultant contracts, etc.) – failure to meet mandatory goals would result in the proposal being non-responsive and will no longer be considered; 2) Eliminate good faith effort documentation on best value projects if mandatory goals are established; and 3) Include *advisory only* goals for all other types of businesses (i.e. Disadvantaged,

Minority, Woman, Disabled Veteran and Other Business Enterprises) on public works construction projects.

Bid Discounts

During FY2011, there were 11 projects within the dollar range for the 5% bid discount available for SLBEs. Two were federally funded and therefore the discount did not apply; 1 was design build and as such, the discount did not apply; 2 projects were sole sourced to non-SLBE/ELBE firms; SLBE/ELBE firms were the low bidder on 3 projects and there was no need for a discount; and the remaining 3 projects did not have SLBE/ELBE prime bidders.

There have not been enough discounted projects to identify any improvement at this point in time. We will continue to monitor and report.

Certification Eligibility

During the initial development of the Program staff researched federal, state, City of Oakland and San Francisco’s small business size standards. In addition, businesses were surveyed and input was obtained from stakeholder meetings to assist with determining the appropriate size standards for San Diego. Staff proposed size standards based on the information researched and feedback received.

The following are statistics regarding certification as of April 5, 2012:

Applications

Total	Approved	Denied	Pending	Inactive
686	462	76	73	75

Approved by General Categories

Total*	Construction	General Services	Professional Services	Suppliers
499	241	20	232	6

*Note: Totals include duplicate company values as a company can have multiple license types

We have identified two unintended consequences of the current eligibility criteria: 1) the requirement to be in business for 1 year was developed primarily with construction contractors in mind due to the risks involved with that type of business. We have received feedback from Architect & Engineering (A&E) consultants that this requirement is not necessarily appropriate as the business risks are significantly lower, owners may be long time residents of San Diego and have years of experience performing as the lead project manager for large or major projects. The current requirement excludes these potential firms from participating in the program; and 2) the financial limits for both A&E and trucking firms appear to be too low. There are 26 certified architectural firms and 1 certified trucking firm. Developing the financial criteria for these firms was challenging as the initial feedback received from surveys/meetings was inconsistent, and similar programs in other cities and the federal requirements didn’t match the needs of San Diego. A recent survey indicated that the majority of firms surveyed agreed or had no objection to raising the financial thresholds for these two categories and allowing A&E firms to be in business for 6 months.

Potential Improvement: Raise the financial eligibility requirements for A&E and trucking firms. In addition, revise the fully operational requirement for A&E firms to 6 consecutive months.

Preference Points

The Program allows for preference points for both SLBE/ELBEs and non-certified firms. The preference points were designed to incentivize non-certified firms to partner with certified firms and to provide a small balance to the advantage that larger firms have with experience, depth and size. We have received some feedback from non-certified construction firms that the preference points allocated to SLBE/ELBE firms provides an unfair advantage in design/build construction contracts. A review of the FY2011 awards indicates there were 6 design-build construction projects - 2 were awarded to SLBEs. The dollar values of these contracts were between \$152,649 (lowest) to \$936,220 (highest). A cursory review of the typical design/build contract size ranges suggests that the size of the design/build contracts the City has awarded is small. As design/build projects requires a significant amount of time, effort and resources to develop and submit proposals, it may be prudent to review dollar amounts for this project delivery method.

Regarding A&E consultant projects, the majority of proposers are including SLBE/ELBE firms at a high level, however after a proposer has been selected and the actual contract has been negotiated, the participation levels are lower than originally proposed. We are currently working with Public Works to determine the cause and identify an appropriate solution to this issue.

Potential Improvement: 1) Modify the preference point structure to include points for approved project specific Mentor-Protégé agreements to further incentivize partnerships; 2) Establish mandatory SLBE/ELBE goals on best value projects similar to MACC projects; 3) Review industry standards and prepare specific guidelines for determining use of the design/build delivery method and 4) Continue working with Public Works and report solution to address lower participation levels after contract negotiation by the end of FY2012.

Additional Potential Improvements

1. EOC “Champion” – As Equal Opportunity Contracting is a Citywide responsibility, designating a “Champion” in all departments to assist with promoting and implementing EOC requirements would be an efficient and effective measure. Each champion would be adequately trained on the policies, procedures and document processing related to EOC. They would serve as a single point of contact for each department to ask questions, expedite documents and promote equal opportunity.
2. Establish SLBE/ELBE liaison groups for construction and goods & services – One of the challenges facing SLBE/ELBE firms is a lack of direct, ongoing access to key City staff involved in the contracting and/or decision making processes. Providing such a forum would allow these firms to ask questions, discuss issues/concerns, receive updates, etc. regarding City contracts and/or contract specifications and requirements. We queried the firms in our database and there is significant interest in participating in such a group. The recently adopted CIP Transparency policy already requires Public Works to conduct quarterly outreach meetings with SLBE/ELBE stakeholders. This proposed improvement will add to that policy.
3. Increase Outreach Efforts to expand pool of certified vendors – Through the Small Business Development Pilot Program and in collaboration with resource partners and organizations, future outreach to local small businesses will be tailored and focused on attracting vendors (goods and service providers) and providing specialized training on the Small Local Business Enterprise Program in order to expand the pool of certified vendors.
4. Develop a comprehensive Supplier Diversity Strategy for goods & services – There are a variety of opportunities for SLBE/ELBEs, other City recognized certified firms and non-certified small business firms to participate and provide goods and services to the City through a supplier diversity program.

These range from obtaining verbal or written quotes directly from these small firms on those contracts that do not require a formal solicitation process to the larger annual supply agreements that could include evaluation/selection criteria on how the large majority owned firms will develop strategic alliance relationships with them in providing the goods or services to the City. The purpose of these alliances is to develop long-term mentoring relationships and /or joint venture partnerships. Purchasing & Contracting will be researching best practices, identify potential areas of goods and services contracting, host meetings to understand barriers (real and perceived) to doing business with the City and formulate a draft Supplier Diversity Strategy over the next six months.

5. Prompt Payment – We have received feedback from certified firms that additional internal discussions regarding our payment processes and procedures are necessary, particularly as it relates to change orders and billings.

6. Sunset SCOPe Program – The SCOPe Program, initially developed in FY2000 to comply with Proposition 209 was primarily an outreach program loosely based on a similar program implemented in the City of Los Angeles. While it provided a significant amount of detailed information regarding prime contractor activities, it had minimal impact on the City’s desire to ensure that all segments of its local business community have a reasonable and significant opportunity to participate in City contracts. With the increase in participation levels experienced with the SLBE Program and the potential for including advisory goals in construction projects, staff believes that the SCOPe Program is no longer necessary.

7. Update Council Policy 800-15 (Equal Opportunity Contracting) – It would be beneficial for all Council Policies that include Equal Opportunity Contracting (EOC) elements be cross referenced. The new CIP Transparency Policy contains a number of EOC related components that need to be cross referenced in 800-15. In addition, it would be prudent to review and update the overall policy with the assistance of the Independent Budget Analyst and Citizens Equal Opportunity Commission.

8. Revise Council Policy 900-15 (Small Business Enhancement Program) – To ensure sufficient levels of service, training, and technical assistance is provided to an increased number of small businesses participating in the Small Business Development Pilot Program, staff proposes to seek an adjustment to SBEP allocations outlined in the Council Policy for specialized technical assistance, training and pilot program services provided by the San Diego Contracting Opportunities Center. Funding for the Small Business Development Pilot Program is allocated through the Small Business Enhancement Program (Council Policy 900-15).


9. Update Debarment Proceedings in Municipal Code – The existing Debarment Code was last amended in 2005. The EOC related information included in the code needs to be updated. In addition, it provides limited latitude for the length of debarment (minimum of 3 up to 5; permanent for certain actions). We have been working with the City Attorney’s Office regarding updates to the code.

CONCLUSION

The above potential improvements could further strengthen and refine the Small Local Business Enterprise Program. They rely on a four-pronged approach to improving supplier diversity – 1) improved outreach to build the volume of prospective contractors; 2) providing technical assistance and direct access to City staff; 3) providing elements of restricted competition and evaluation preferences, where appropriate; and

4) continued stakeholder input to identify ways to make it easier to do business with the City. They were developed based on a review of the impacts of the current program, similar programs in other cities (the City of Oakland's revised Local and Small Local Business Enterprise Program, San Francisco Local Business Enterprise and Non-Discrimination in Contracting Ordinance), the Insight Center for Community Economic Development's 2012 Inclusive Business Initiative "Public Contracting in the Proposition 209 Era", U.S. Small Business Administration's Small Business Size Standards and State of California's Small Business Certification Eligibility Requirements.

In addition, we conducted a brief survey of our SLBE/ELBE firms regarding the existing program and potential improvements. We received beneficial feedback from the firms that responded to the survey, however, it was a small sampling (78). Additional stakeholder meetings are critical to obtaining feedback to assist with the preparation of a final list of recommended improvements. We anticipate scheduling several meetings and presenting the results prior to the end of this fiscal year. The attached matrix, which was shared and briefly discussed at the Citizens Equal Opportunity Commission's April 4th meeting, provides a summary of the potential changes discussed in the report.



Debra Fischle-Faulk, Director
Administration Department

Approved: _____



Wally Hill
Assistant Chief Operating Officer

- Attachments:
1. City Attorney Memorandum dated February 27, 2012
 2. Small Local Business Program Potential Improvements
 3. Current Good Faith Effort Requirements
 4. Debarment Code

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.

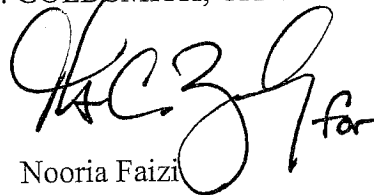
The purpose of this analysis is to substantiate that increasing the restricted competition threshold is reasonably related to legitimate interests of the City.

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



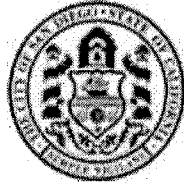
Nooria Faizi
Deputy City Attorney

SMALL LOCAL BUSINESS PROGRAM
POTENTIAL IMPROVEMENTS

Enhancement	Current	Benefits	Notes
1. Sunset SCOPE Program	Program "on the books" – not being utilized.	<ul style="list-style-type: none"> •Eliminates program that had minimal participation results. •Saves staff time. 	Replaced by SLBE Program.
2. All Departments that procure goods, services, and/or public works to appoint an Equal Opportunity Contracting Program (EOC) "Champion".	Not in place.	<ul style="list-style-type: none"> •Assist with promoting and implementing the City's equal opportunity contracting laws, policies and procedures on a citywide basis. •Assist with internal training and document processing. 	"Champion" must be at Deputy Director or above level.
3. Refine Good Faith Effort Documentation Requirements	See Attached.	<ul style="list-style-type: none"> •Better meet needs of both SLBE/ELBE and large firms. 	Reviewed by City Attorney.
4. Add advisory participation levels – similar to former SCOPE Program to contract specifications	Not in place.	<ul style="list-style-type: none"> •Identifies availability of all firms (DBE, MBE, WBE, DVBE, OBE) 	Under City Attorney review
5. Mandatory SLBE/ELBE goals for all "best value" projects	Included in MACC projects only.	<ul style="list-style-type: none"> •Consistent with MACC projects. •Removes good faith requirement – streamlines process. •Emphasizes results, not simply efforts 	Under City Attorney review
6. Establish SLBE/ELBE Construction Industry and Goods & Services Group to meet quarterly with City staff similar to AGC liaison	Not in place.	Ongoing feedback from SLBE firms regarding program in non-threatening environment.	
7. Raise Financial Eligibility Thresholds: <u>Trucking – SLBE:</u> \$3.0M <u>ELBE:</u> \$1.5M <u>Prof. Services/ A&E –</u> <u>SLBE:</u>\$2.0M <u>ELBE:</u> <u>\$1.0M</u>	<u>Trucking – SLBE:</u> \$2.0M, <u>ELBE:</u> \$1.0M <u>Professional Svcs/A&E</u> – <u>SLBE:</u>\$1.5M, <u>ELBE:</u> \$750K	<ul style="list-style-type: none"> •Increase pool of small local business in these categories. •Initial thresholds too low – unintentionally reduced participation levels of small companies in these areas. 	
8. Revise fully operational requirement for licensed Professional Services/ A&E to 6	1 year requirement.	<ul style="list-style-type: none"> •Feedback from this group indicated that 1 year requirement is more appropriate for construction businesses 	

**SMALL LOCAL BUSINESS PROGRAM
POTENTIAL IMPROVEMENTS**

<i>consecutive months.</i>		as risk is not as high. •Increases availability of eligible firms.	
9. Increase Limit of restricted competition on construction projects	\$500,000 and below	•Increase direct opportunities for SLBEs – balances MACC	City Attorney opined raising threshold is permissible with appropriate evidence substantiating the need. Opinion is attached.
10. Allow points for approved project specific Mentor Protégé agreements	Not in place	•Helps build capacity of SLBE/ELBE firms and increase competition.	Applies to best value delivery method for construction projects, consultant and goods & services projects.
11. Update Council Policy 800-15	Does not reference SLBE Program or new transparency policy.	•Ensures consistency and cross references on related programmatic policies and procedures	
12. Update Muni-Code related to Debarment Proceedings	See Attached.	•Update process, include best value contracts, allow for a 1 year debarment and includes EO related violations. •Sanctions bad behavior.	Working with City Attorney's Office.
13. Increase outreach efforts to expand pool of certified vendors in to Small Business Enhancement Program.	Not currently part of program.	•Increase number of SLBE/ELBEs in program providing goods and services.	
14. Revise Council Policy 900-15 - Small Business Enhancement Program (SBEP) to make permanent - the Small/Disadvantaged Business Development Pilot Program and to increase the Contracts Opportunity Center (COC) contract by 25%	Currently a one year requirement.	•Provide ongoing technical assistance	
15. Design, develop and implement a comprehensive Supplier Diversity Strategy	Not currently in place.	•A comprehensive framework that provides assistance and access to City contracts to a broad base of SLBE/ELBE and other certified firms.	



City of San Diego

Small Local Business (SLBE) Program INSTRUCTIONS FOR BIDDERS COMPLETING THE GOOD FAITH EFFORT SUBMITTAL

The Special Provisions for projects subject to the SLBE Program requires contractors to take affirmative steps to attract and utilize SLBE and ELBE firms.

The information necessary to establish the bidder's adequate good faith efforts to meet the contract goal must include:

A. ADVERTISEMENT REQUIREMENTS

Advertisements for subcontract work must comply with the following requirements:

1. Advertisements must be published at least 10 business days prior to bid opening. Provide the names and dates of each publication of where the advertisement was published. *[Note: The advertisement is not required to be placed everyday for the 10 business days prior to bid opening.]*
2. There must be at least two advertisements published, one advertisement *in a trade publication and one in a focus group publication.* Additional advertising for SLBE-ELBE participation may be placed in newspapers, trade papers and on the Internet. For a listing of publications accepting advertisements, please visit the City of San Diego Equal Opportunity Contracting home page at <http://www.sandiego.gov/eoc/>
 - 2.1 Newspaper advertisements must be in the Bids Wanted, Legal Notices section of the Classified Ads, Subcontracting Opportunities or Business Opportunities **NOT** the Employment Opportunities Section.
3. Advertisements must state which items or portions of work the bidder is requesting subcontractor pricing.

3.1. It is the bidder's responsibility to demonstrate that enough work sufficient to meet the SLBE-ELBE goal was made available to SLBE-ELBE firms. *The bidder should make as many items of work available as possible to meet the goal, and at a minimum an amount of work equal to the goal. If necessary to reach the goal, the work should include those items normally performed by the bidder with its own forces, supplies and even items with a dollar value below 1/2 of 1% of the total bid. Bidders shall utilize Form AA60 to demonstrate compliance with this requirement and submit the completed form with Good Faith Effort documentation.*

4. Advertisements must state that plans and specs are available at no cost to interested SLBE-ELBE firms and how to obtain them.
5. Advertisements must state that assistance is available from the bidder for SLBE-ELBE subcontractors in obtaining necessary equipment, supplies, or materials.
6. Advertisements must state that assistance is available from the bidder for SLBE-ELBE firms in obtaining bonding, lines of credit or insurance.
7. Bidders **MUST** provide proof of publication of each advertisement by providing the publication affidavit which must include a legible copy of the entire advertisement and the original ENTIRE page of the publication in which the advertisement appears.

B. SLBE-ELBE WRITTEN SOLICITATION REQUIREMENTS

Bidders must directly solicit SLBE-ELBE firms on the City's approved SLBE-ELBE list. Solicitations for subcontract/vendor work must comply with the following requirements:

1. The solicitation must be dated and list the name of the SLBE-ELBE firm. *Solicitations must be made to the SLBE-ELBE firms at least 10 business days prior to bid opening.*
2. Solicitation must state which items or portions of work the bidder is requesting subcontractor pricing.
 - 2.1.** It is the bidder's responsibility to demonstrate that enough work sufficient to meet the SLBE-ELBE goal was made available to SLBE-ELBE firms. *The bidder should make as many items of*

work available as possible to meet the goal, and at a minimum an amount of work equal to the goal. If necessary to reach the goal, the work should include those items normally performed by the bidder with its own forces, supplies and even items with a dollar value below 1/2 of 1% of the total bid. Bidders shall utilize Form AA60 to demonstrate compliance with this requirement and submit the completed form with Good Faith Effort documentation.

3. Solicitation must state that plans and specs are available at no cost to interested SLBE-ELBE firms and how to obtain them.
4. Solicitations must state that assistance is available from the bidder for SLBE-ELBE subcontractors in obtaining necessary equipment, supplies, or materials.
5. Solicitations must state that assistance is available from the bidder for SLBE-ELBE firms in obtaining bonding, lines of credit or insurance.
6. Bidder must solicit **ALL** SLBE-ELBE firms on the City's approved list, who have the NAICS code for the subcontract work sought by the general contractor.
7. Bidders must provide copies of **ALL** solicitations with one of the following forms of verification *that the solicitations were sent*: a) If mailed: provide copies of the metered envelopes or certified mail receipts b) If faxed: provide copies of the fax transmittal confirmation sheet(s) c) If emailed: provide copies of the email delivery confirmation sheet(s). No credit shall be given for error messages, busy, cancelled, undeliverable, etc.

C. SLBE-ELBE WRITTEN SOLICITATION FOLLOW UP REQUIREMENTS

Bidders must follow-up with all SLBE – ELBE firms that were notified of the subcontracting opportunities to determine their level of interest and commitment to bid the project. When following up with the SLBE – ELBE firms, the bidder must do the following:

1. Follow up communications must start no less than 5 business days prior to bid opening.
2. Bidders must follow up with all SLBE-ELBE firms in writing. Bidders must provide copies of **ALL** written follow up notices with one of the following forms of verification *that the follow up notices were sent*: a)

If mailed: provide copies of the metered envelopes or certified mail receipts *b*) If faxed: provide copies of the fax transmittal confirmation sheet(s) *c*) If emailed: provide copies of the email delivery confirmation sheet(s). No credit shall be given for error messages, busy, cancelled, undeliverable, etc.

3. Bidders must make at least three follow-up telephone calls to each SLBE – ELBE firm at least five days prior to bid opening date. Bidders must submit a telephone log as identified below.

3.1. Submit a telephone log, as proof of telephone call, with the following requirements: project name, name of person making the phone call, name of firm contacted, contact person's name, date of call, time of call, and details of conversation.

D. SUBCONTRACT AWARD SUMMARY

Bidders must act in good faith with interested SLBE-ELBE firms and may only reject bids for legitimate business reasons. The bidder must submit the following documentation:

1. A **DETAILED** summary sheet which includes bid item number, scope of work, subcontractor/vendor name, bid amount, certification type, subcontractor/vendor selection and reason for selection / non-selection of all the subcontractors/vendors that responded.
2. Copies of all subcontract/vendor bids received including bids for areas of work that were not included in the outreach and quotes from both certified and non-certified subcontractors/vendors. Subcontractor bid amounts **MUST** match the bid-listed dollar amounts on form AA35 and AA40 submitted with bidders sealed bid and the summary sheet dollar amounts **MUST** also match these amounts. If the Bidder decides to Self-Perform a scope of work, the Bidder **MUST** submit a detailed quote to show that the Bidder's price is competitive to the price of the subcontractors that responded to outreach efforts. All dollar amounts and scopes of work on the subcontractor/vendor bid must not be altered by the prime bidder. If a revision is necessary, a revised quote must be obtained and provided. All verbal quotes **MUST** be substantiated by corresponding written quote from the subcontractor/vendor.

E. OUTREACH ASSISTANCE REQUIREMENTS

Written notice of subcontractor opportunities must be forwarded to

local organizations or groups to assist with outreach efforts. When contacting local organizations or groups, the Bidder **must do** the following:

1. Contact a minimum of 5 local organizations or groups to provide assistance in contacting, recruiting and using SLBE-ELBE firms by written notice. For a listing of organizations or groups offering assistance, please visit the City of San Diego Equal Opportunity Contracting home page at <http://www.sandiego.gov/eoc/>
2. Written notice must indicate the date of the notice and name of the local organization or group. ***Written notices must be forwarded to the organizations or groups at least 10 business days prior to bid opening.***
3. Written notice must state which items or portions of work the bidder is requesting subcontractor pricing.
 - 3.1. It is the bidder's responsibility to demonstrate that enough work sufficient to meet the SLBE-ELBE goal was made available to SLBE-ELBE firms. ***The bidder should make as many items of work available as possible to meet the goal, and at a minimum an amount of work equal to the goal. If necessary to reach the goal, the work should include those items normally performed by the bidder with its own forces, supplies and even items with a dollar value below 1/2 of 1% of the total bid. Bidders shall utilize Form AA60 to demonstrate compliance with this requirement and submit the completed form with Good Faith Effort documentation.***
4. Written notice must state that plans and specs are available at no cost to interested SLBE-ELBE firms and how to obtain them.
5. Written notice must state that assistance is available from the bidder for SLBE-ELBE subcontractors in obtaining necessary equipment, supplies, or materials.
6. Written notice must state that assistance is available from the bidder for SLBE-ELBE firms in obtaining bonding, lines of credit or insurance.
7. Bidders must provide copies of ***ALL*** notices with one of the following forms of verification that the notices were sent: a) If mailed: provide copies of the metered envelopes or certified mail receipts b) If faxed: provide copies of the fax transmittal confirmation sheet(s) c) If emailed: provide copies of the email delivery confirmation sheet(s). No credit shall be given for error messages, busy, cancelled, undeliverable, etc.

NOTE: Be careful when referring to “See Attachments” without providing explicit information where to find the material. Clearly identifying these items as Attachment A, Attachment B, etc. is suggested. Attachments may include, but are not limited to, copies of advertisements, solicitations and logs of telephone follow-ups, e-mail or fax receipts.

Article 2: Administrative Code**Division 8: Debarment**

*(“Budget Estimate” added 1-22-1952 by O-5046 N.S.)
(Retitled to “Debarment” on 4-15-1996 by O-18283 N.S.)*

§22.0801 Statement of Purpose

- (a) The *City* intends to accept bids or responses to requests for proposals or qualifications from, award *contracts* to, execute *contracts* with, consent to subcontracts, or do business in any way only with responsible *persons*. *Debarment* and *suspension* are discretionary actions that, taken in accordance with this Division, are appropriate means to effectuate this policy. *Debarment* and *suspension* are designed to protect the *City* by ensuring full and open competition by having contractual relationships only with responsible *persons*.
- (b) The serious nature of *debarment* and *suspension* requires that these sanctions be imposed only in the public interest for the *City's* protection, not for purposes of punishment, and only for the grounds listed and in accordance with procedures set forth in this Division.

(“Statement of Purpose” repealed and “Statement of Purpose” added 9-3-2002 by O-19093 N.S.)

§22.0802 Definitions

All defined terms in this Division appear in italics. For purposes of this division:

“Adequate evidence” means information sufficient to support the reasonable belief that a particular act or omission has occurred.

“Affiliate” means a *person* who:

- (a) is the assignee, successor, subsidiary of, or parent company, of another *person*; or,
- (b) is a *controlling stockholder*; or,
- (c) has the same or similar *management* of the *debarred* corporate or other legal entity; or,

- (d) directly or indirectly controls, or has the power to control, another *person*, or is directly or indirectly controlled by another *person*. Indicia of control include but are not limited to, interlocking *management* or ownership, identity of interests among *relatives*, shared facilities and equipment, common use of employees, or a business entity organized following the *debarment*, *suspension*, or proposed *debarment* of a *person* which has the same or similar *management*, ownership or principal employees as the contractor that was *debarred*, *suspended* or proposed for *debarment*, or the *debarred person* or the business entity created after the *debarment*, *suspension* or proposed *debarment* operates in a manner designed to evade the application of this Division or to defeat the purpose of this Division.

“*Bidder*” means a *person* who has submitted a bid, proposal or other document seeking award of a *contract*.

“*Contract*” means any written agreement between the *City* and another *person*. It also includes a *public works contract*. It also includes a *City* issued purchase order.

“*Controlling stockholder*” means a stockholder who:

- (a) owns more than 25% of the voting stock of a corporation; or,
- (b) notwithstanding the number of shares that the stockholder owns, has the power to direct or control the direction of the *management* or policies of a corporation.

“*Debar*” or “*Debarment*” means the disqualification of a *person* from:

- (a) bidding on a *contract*; or,
- (b) submitting responses to *City*’s requests for proposals or qualifications; or,
- (c) being awarded a *contract*; or,
- (d) executing a *contract*; or
- (e) participating in a *contract* as a *subcontractor*, material supplier, or employee of a *prime contractor* or another *subcontractor* for a period of time specified by the *Debarment Hearing Board* following a hearing.
- (f) directly or indirectly (e.g. through an *affiliate*) submitting offers for, or executing *contracts*, or subcontracts with the *City*; or

- (g) conducting business with, or reasonably may be expected to conduct business with, the City as an employee, agent, or representative of another *person*.

“*Debarment Hearing Board*” means a board established by the City to hold hearings, take evidence, and to make determinations about *debarment* for the City.

“*Department*” means a City department organized under authority of the City Manager.

“*Final Construction Contractor Performance Evaluation*” means a City-issued evaluation of a *person’s* overall performance on a *public works contract*. This evaluation is generally issued subsequent to completion of performance on the *public works contract*. It does not include *performance evaluations*, *final performance evaluations*, or *partial construction contractor performance evaluations*.

“*Final Performance Evaluation*” means a City-issued final evaluation of a *person’s* overall performance on a *contract* which is generally issued subsequent to completion of performance on the *contract*. It includes *final construction contractor performance evaluations*. It does not include *performance evaluations* or *partial construction contractor performance evaluations*.

“*Management*” means the officers, partners, owners, foremen or other individuals responsible for the financial and operational policies and practices of a *person*.

“*Partial Construction Contractor Performance Evaluation*” means a City-issued evaluation of a *person’s* performance on a specific *public works contract*. It includes only evaluations issued during performance of a *public works contract*. It does not include *final construction contractor performance evaluations*.

“*Performance Evaluation*” means a City-issued evaluation of a *person* describing the *person’s* performance on a specific *contract*. It includes evaluations issued during performance of a *contract* and *partial construction contractor performance evaluations*. It does not include *final performance evaluations* or *final construction contractor performance evaluations*.

“*Person*” has the same meaning as that in San Diego Municipal Code section 11.0210. In addition, if a *person* is a corporate or other legal entity, it includes individuals who constitute the *person’s management*. It also includes any individual or other legal entity that

- (a) Directly or indirectly (e.g. through an *affiliate*), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a *contract*, or a subcontract under a *contract*; or
- (b) conducts business, or reasonably may be expected to conduct business, with the City as an agent or representative of another *person*.

“*Preponderance of the evidence*” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

“*Prime contractor*” means a *person* who enters a *contract* directly with the *City*.

“*Public works contract*” means a *contract* for the construction, reconstruction or repair of public buildings, streets, utilities, and other public works.

“*Relative*” means:

- (a) an individual related by consanguinity within the second degree as determined by the common law; or,
- (b) a spouse; or,
- (c) an individual related to a spouse within the second degree as determined by the common law; or,
- (d) an individual in an adoptive relationship within the second degree as determined by the common law; or
- (e) any individual considered to be “family” in commonly understood terms of the word.

“*Subcontractor*” means:

- (a) a *person* who contracts directly with a *prime contractor* but not directly with the *City*; or,
- (b) any *person* under contract with a *prime contractor* or another *subcontractor* to provide any service, materials, labor or otherwise perform on a *contract*.

Subcontractor includes a trade contractor or specialty contractor.

“*Suspend*” or “*Suspension*” means the *debarment* of a *person* for a temporary period of time pending the completion of an investigation and any proceedings before a *Debarment Hearing Board* and any appeals therefrom.

“*Willfully failed to cooperate*” means:

- (a) intentionally failed to attend a hearing and/or give testimony, or
- (b) intentionally failed to provide documents, books, papers, or other information upon request of the City Manager, the *Debarment Hearing Board*, or the City Council.

(“*Definitions*” repealed and “*Definitions*” added 9-3-2002 by O-19093 N.S.)

§22.0803 Scope of Division

- (a) This Division establishes procedures for determining whether a *person* is to be *debarred* or *suspended*.
- (b) This Division sets forth the grounds for *debarment* and *suspension*.
- (c) This Division provides that a list of *debarred* and *suspended persons* is to be created and maintained by the City Manager. It further spells out the consequences of a *person’s debarment* and *suspension*.

(“*Debarment Procedures for Procurement and Public Works Contracts*” repealed; “*Scope of Division*” added 9-3-2002 by O-19093 N.S.)

§22.0804 Debarment Hearing Board to be Established

Upon receipt of a recommendation for *debarment* from a *City department*, the City Manager shall appoint a fair and impartial board called a *Debarment Hearing Board* to hear and determine whether a *person* should be *debarred*. The City Manager shall appoint three individuals to serve on each *Debarment Hearing Board*. These individuals shall be unbiased and may be City employees, but shall not be employees who have participated in the decision to recommend the *debarment* nor are subject to the authority, direction or discretion of employees or have participated in the decision to recommend *debarment*. The *Debarment Hearing Board* shall follow procedures set forth in this Division and shall make decisions based on evidence taken at a hearing. The *Debarment Hearing Board’s* scope of authority and duties are set forth in this Division.

(“*Debarment Procedures for Materials, Supplies, Equipment, Insurance or Personal Service Contracts*” repealed; “*Debarment Hearing Board to be Established*” added 9-3-2002 by O-19093 N.S.)

(1-2005)

§22.0805 *Suspension Once City Manager Decides to Recommend Debarment*

- (a) Once a determination has been made by the City Manager that *adequate evidence* exists supporting *debarment*, the City Manager may *suspend* the *person* pending a *debarment* decision where the City Manager finds that doing so is in the public interest.
- (b) The City Manager shall notify the *person* of the *suspension* in accordance with Section 22.0806, pending the *Debarment Hearing Board* or City Council's ruling on the matter.
- (c) Once the City Manager has *suspended* a *person*, the *suspension* shall continue until the *Debarment Hearing Board* makes a final decision on the proposed *debarment* or until there has been a final ruling by the City Council following an appeal of a permanent *debarment* decision, if any appeal is filed.

(*"General" repealed; "Suspension Once City Manager Decides to Recommend Debarment" added 9-3-2002 by O-19093 N.S.*)

§22.0806 **Notices**

- (a) Whenever a notice is required to be delivered under this Division, the notice shall be delivered by any of the following methods. Service is effective as described herein unless different provisions are specifically stated to apply:
 - (1) Personal delivery, service shall be deemed effective on the date of delivery; or,
 - (2) Certified mail, postage prepaid, return receipt requested. Simultaneously, the same notice may be sent by regular mail. If a notice that is sent by certified mail is returned unsigned, then delivery shall be deemed effective pursuant to regular mail, provided the notice that was sent by regular mail is not returned. Service shall be deemed effective on the date of mailing; or,
 - (3) Publication. Service shall be deemed effective on the first date of publication.
- (b) Proof of delivery of notice may be made by the certificate of any officer or employee of the City or by declaration under penalty of perjury of any *person* over the age of eighteen years. The proof of delivery shall show that delivery was done in conformity with this Division or other provisions of law applicable to the subject matter concerned.

- (c) The failure of any *person* to receive any notice served in accordance with this Division shall not affect the validity of any *debarment* proceedings.
(“List of Debarred Contractors” repealed; “Notices” added 9-3-2002 by O-19093 N.S.)

§22.0807 Grounds for Debarment

- (a) A final conviction, including a plea of *nolo contendere*, or final unappealable civil judgment of any one or more of the grounds lists in Section 22.0807(a),(1)-(5) constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the criminal conviction, plea, or civil judgment:
- (1) under any state or federal statute or municipal ordinance for embezzlement, theft, fraudulent schemes and artifices, fraudulent schemes and practices, bid rigging, perjury, forgery, bribery, falsification or destruction of records, receiving stolen property or any offense indicating a lack of business integrity or business honesty which affects the *person's* or its *affiliate's* responsibility; or,
 - (2) for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract; or,
 - (3) for violations of California Government Code sections 84300(c) and 84301 (sections of the California Political Reform Act requiring disclosure of true campaign donor), as they exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occur with respect to a City election; or,
 - (4) for a conviction under federal or state antitrust statutes involving public contracts or the submission of offers or bid proposals,
- (b) A Fair Political Practices Commission enforcement order against a *person*, either following a hearing or by stipulation, that makes a finding of a violation of California Government Code sections 84300(c) and 84301, as those sections exist on May 15, 1996, or as amended thereafter, which violations occurred on or after May 15, 1996, and which violations occurred with respect to a City election, constitutes grounds for permanent *debarment* of the *person* who is subject to, or is the *affiliate* of the *person* who is subject to, the enforcement order.

- (c) Any one of the following acts or omissions by a *person* also constitute grounds for permanent *debarment*:
- (1) the *person* committed any offense, took any action, or failed to take an action, which indicates a lack of business integrity and which could directly affect the reliability and credibility of performance of the *person* on future *contracts* with the *City*; or,
 - (2) the *person* committed a violation of San Diego Charter section 97; or,
 - (3) the *person* has committed any corrupt practice in bidding for or in any way seeking award of a *contract*, or has committed any corrupt practice in any way relating to a *City contract*; or,
 - (4) the *person* was established to, or operates in a manner designed to evade the application of this Division or to defeat the purpose of this Division;
- (d) Any two or more of the following acts or omissions by a person constitute grounds for debarment of that person for no less than three years and up to and including permanently:
- (1) the *person* unjustifiably refused to properly perform or complete *contract* work or warranty performance; or,
 - (2) the *person* unjustifiably failed to honor or observe contractual obligations or legal requirements pertaining to the *contract*; or,
 - (3) the *person* used substandard materials, or has failed to furnish or install materials in accordance with *contract* requirements, even if the discovery of the defect is subsequent to acceptance of the project and expiration of the warranty thereof, if such defect amounts to intentionally deficient or grossly negligent performance of the *contract* under which the defect occurred; or,
 - (4) the *person* committed a violation of the Drug-Free workplace Act of 1988 (41 USC sections 701-707); or,
 - (5) the *person* *willfully failed to cooperate* in the investigation or hearing of the proposed *debarment*; or,
 - (6) the *person* performs, or fails to perform, a *contract* in such a way that environmental damage results or a violation of environmental laws or permits is committed; or,

- (7) the *person* has not implemented its Equal Employment Opportunity Plan required by Municipal Code section 22.2705, or practices unlawful discrimination in employment, and the *person* has not taken corrective action after sufficient notice by the *City*;
 - (8) the *person* has falsified a statement of gross income submitted under the *City*'s Minor Public Works Construction Project program; or,
 - (9) the *person* has committed an act or omission of so serious or compelling a nature that:
 - (a) it affects the present responsibility of the *person* to be awarded a *contract* or to participate as a *subcontractor* in a *contract*; or,
 - (b) it affects the integrity of the procurement process.
 - (10) Any one of the following acts or omissions by a person listed in Section 22.0807(e)
- (e) The following acts or omissions by a *person* constitute grounds for *debarment* of that *person* for no less than one year.
- (1) the *City* issued the *person* two or more *performance evaluations* from the *City* with a rating of unsatisfactory within a two-year period; or,
 - (2) the *City* has issued the *person* a *final performance evaluation* with a rating of unsatisfactory.
 - (3) the *person* has failed to timely submit bond, *contract* documents, insurance documents or any other item required by the *City*, acceptable to the *City* which conform to bid, request for proposal and/or *contract* requirements.
 - (4) the *person* who is notified that they are the apparent low bidder on a *contract* has failed to timely submit on two or more occasions complete Equal Opportunity Outreach documentation that is required by Municipal Code section 22.2705 or by policies adopted pursuant to that Division and that is acceptable to the *City*.
 - (5) the *person* submitted two or more claims of computational or other error in a bid to the *City* within a two-year period.

(“Effect of Listing” repealed; “Grounds for Debarment” added 9-3-2002 by O-19093 N.S.)

(Amended 1-24-2005 by O-19353)

(1-2005)

§22.0808 Debarment Proceedings before the Debarment Hearing Board or City Council

The proceedings shall be as informal as is compatible with the requirements of justice. The *Debarment Hearing Board* and/or City Council need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiries in the matter through all means and in a manner best calculated to make a just factual determination.

(“*Continuation of Existing Contracts*” repealed; “*Debarment Proceedings before the Debarment Hearing Board or City Council*” added 9-3-2002 by O-19093 N.S.)

§22.0809 Debarment Hearing Board’s Authority to Debar; Debarment Hearing Board’s Decision Final

- (a) After notice and hearing held in accordance with the procedures set forth in this Division and as further developed in accordance with policies adopted by the City Council, the *Debarment Hearing Board* shall determine whether a *person* is to be *debarred* and for what length of time. To *debar* a *person*, the *Debarment Hearing Board* must find by a *preponderance of the evidence* that one or more grounds for *debarment* stated in Section 22.0807 exist.
- (b) Except as provided in Section 22.0809(c), a *Debarment Hearing Board’s* decision shall be final.
- (c) A decision by a *Debarment Hearing Board* to permanently *debar* a *person* may be appealed to the City Council in accordance with Section 22.0810. The filing of a request for appeal of the *debarment* decision shall not stay the *Debarment Hearing Board’s* decision pending a final decision of the City Council.
- (d) The *Debarment Hearing Board* shall deliver notice of the decision to the *person* subject to the *debarment* hearing and to the City Manager.
(“*Scope of Debarment*” repealed; “*Debarment Hearing Board’s Authority to Debar; Debarment Hearing Board’s Decision Final*” added 9-3-2002 by O-19093 N.S.)

§22.0810 Appeals to City Council from Certain Decisions of Debarment Hearing Board

- (a) If a *Debarment Hearing Board* has made a determination to *debar* a *person* permanently, that *person* may appeal that decision to the City Council in accordance with procedures set forth in this Division and procedures adopted by the City Council.

- (b) A *person* who has been *debarred* may request an appeal to the City Council no later than five working days from the date of the notice of the *Debarment Hearing Board's debarment* decision. The *debarred person's* request for appeal shall set forth in detail the reasons why the *person* disagrees with the decision. The *person* shall file the notice of appeal with the City Clerk, who shall calendar the appeal hearing in front of the City Council after consultation with the City Manager and Mayor.
- (c) The filing of a request for an appeal shall not stay the *Debarment* decision. (*"Appeals to City Council from Certain Decisions of Debarment Hearing Board" added 9-3-2002 by O-19093 N.S.*)

§22.0811 Submission of Argument on Appeal

- (a) At the City Council hearing on the appeal, no new evidence may be presented by the City or any *person*. However, if the *person* who filed the appeal under Section 22.0810 wishes to submit argument supporting the appeal, that *person* shall submit argument in writing with the City Clerk no later than 4:00 p.m. ten calendar days prior to the date on which the hearing is scheduled to be held. Filing shall also be made on all *persons* subject to the *debarment* and on the *Debarment Hearing Board*.
- (b) Where argument is submitted in accordance with Section 22.0811, the City may submit rebuttal arguments, which shall be filed with the City Clerk no later than 4:00 p.m. five calendar days prior to the date on which the hearing is scheduled to be heard. Filing shall also be made on all *persons* subject to the *debarment*.
(*"Submission of Argument on Appeal" added 9-3-2002 by O-19093 N.S.*)

§22.0812 Standard of Proof

The standard of proof for the *Debarment Hearing* shall be a *preponderance of the evidence*.
(*"Standard of Proof" added 9-3-2002 by O-19093 N.S.*)

§22.0813 Imputation of Knowledge and Conduct

- (a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individuals associated with a *person* may be imputed to the *person* when the conduct occurred in connection with the individual's performance of duties for, or on behalf of, the *person*, or with the *person's* knowledge, approval, or acquiescence. The *person's* acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

- (b) The fraudulent, criminal, or other seriously improper conduct of a *person* may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the *person* who participated in, knew of, or had reason to know of the *person's* conduct.
- (c) The fraudulent, criminal, or other seriously improper conduct of one *person* participating in a joint venture or similar arrangement may be imputed to other participating *persons* if the conduct occurred for, on approval of, or acquiescence of these *persons*.

Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

("Imputation of Knowledge and Conduct" added 9-3-2002 by O-19093 N.S.)

§22.0814 Judicial Review

Once a *Debarment Hearing Board* or the City Council has issued a final decision as provided in this Division, the time in which judicial review of the order must be sought shall be governed by California Code of Civil Procedure section 1094.6.

("Judicial Review" added 9-3-2002 by O-19093 N.S.)

§22.0820 Creation of List of Debarred and Suspended Persons

- (a) The City Manager shall create and maintain a list of *persons* who have been *debarred* or *suspended* in accordance with polices and procedures of this Division.

- (1) This list shall include the names and addresses of all *persons* who have been *debarred* or *suspended*.

- (2) For each *debarred* or *suspended person*, the list shall state the date of commencement and expiration of the *debarment* or *suspension*.

- (b) The City Manager shall establish procedures to provide for the effective use of the list to ensure that the *City* does not do business with *persons* who have been *debarred* or *suspended*.

("Creation of List of Debarred and Suspended Persons" added 9-3-2002 by O-19093 N.S.)

§22.0821 Effect of Debarment or Suspension

- (a) *Persons* who have been *debarred* or *suspended* are excluded from conducting business with the *City* on behalf of themselves or as agents or representatives of other *persons* for the duration of the *debarment* or *suspension*.

- (b) *Persons* who have been *debarred* or *suspended* are excluded from submitting bids, directly or indirectly (e.g., through an *affiliate*), submitting responses to requests for proposal or qualifications, receiving *contract* awards, executing *contracts*, participating as a *subcontractor*, employee, agent or representative of another *person* contracting with the *City*, or receiving *contracts* for the period of *debarment* or *suspension*.
- (c) *Persons* who have been *debarred* or *suspended* are excluded from acting in a capacity where the *person* reasonably may be expected to submit offers for or be awarded, a *contract*, or a subcontract under a *contract*; or
- (d) *Persons* who have been *debarred* or *suspended* are excluded from conducting business, or from acting in a capacity where the *person* reasonably may be expected to conduct business, with the *City* as an agent or representative of another *person*.
- (e) The *management* of a corporate or other legal entity that has been *debarred* or *suspended* shall not conduct business or act in a capacity where they reasonably may be expected to conduct business with the *City* under a different corporate name.
- (f) The *City* shall not accept, receive, open a bid, evaluate for award, or include any proposals, quotations, bids, or offers from any *debarred* or *suspended person* for the duration of the *debarment* or *suspension*.
- (g) The *City* shall not award or approve the award of a *contract* or execute a *contract* under which a *debarred* or *suspended person* is intended to participate as a *subcontractor* or material supplier.
- (h) A *prime contractor* who is awarded a *contract* shall not employ, subcontract with, nor purchase materials or services from a *debarred* or *suspended person*;
- (i) When a *debarred person* sells or otherwise transfers to a *relative* or to any other *person* over whose actions the *debarred person* exercises substantial influence or control, then that *relative* or other *person* is automatically *suspended* or *debarred* or proposed for *debarment* to the same extent as the seller or transferor is *debarred*, *suspended*, or proposed for *debarment*.
(*"Effect of Debarment or Suspension"* added 9-3-2002 by O-19093 N.S.)

§22.0822 Effect of Debarment or Suspension on an Affiliate

- (a) If the *City* determines that a *person* is an *affiliate* of a *person* that is *debarred*, *suspended* or proposed for *debarment*, the *affiliate* is *debarred* or *suspended* to the same extent as the *person* that is *debarred*, *suspended* or proposed for *debarment*.

(1-2005)

- (b) The *affiliate* debarred under Section 22.0822(a) may request an appeal of the decision to the *Debarment Hearing Board* by submitting a written request to the City Clerk. An appeal under Section 22.0822(b) shall be governed by the same rules and regulations in accordance with this Division as are applicable to a *Debarment Hearing Board's* procedure to *debar* a *person*.
- (c) The filing of a request for review under Section 22.0822(b) shall not stay the decision to *debar* the *affiliate*.
- (“Effect of Debarment or Suspension on an Affiliate” added 9-3-2002 by O-19093 N.S.)

§22.0823 Effect of *Debarment* or *Suspension* by Another Governmental Agency

If a *person* has been *debarred* by another governmental agency, that *person* may be automatically *debarred* by the City Manager permanently, or for three years, or until the other governmental agency's term of *debarment* expires, in the sole discretion of the City Manager.

(“Effect of Debarment or Suspension by another Governmental Agency” added 9-3-2002 by O-19093 N.S.)

§22.0824 Liability for Increased Costs

Any *person* who enters a *contract* with the City, either directly as a *prime contractor* or indirectly as a *subcontractor*, during a period of *suspension* or *debarment* imposed upon that *person* by the City under its rules and regulations shall be liable to the City for increased costs incurred as a result of replacing the *debarred* or *suspended person*.

(“Liability for Increased Costs” added 9-3-2002 by O-19093 N.S.)

§22.0825 Effect of *Debarment* or *Suspension* on Existing *Contracts*

- (a) Except as otherwise provided in this section and notwithstanding the *debarment*, *suspension*, or proposed *debarment*, of a *person*, the *City* may continue *contracts* or subcontracts it has with that *person* that are in existence at the time the *person* was *debarred*, *suspended*, or proposed for *debarment*.
- (b) If the basis of a *person's debarment* or *suspension* is so serious that the City Manager believes that termination of *contracts* or subcontracts the City has with that *person* that are in existence at the time the *person* is *debarred* or *suspended* is in the best interests of the *City*, the City Manager may take actions necessary to terminate those *contracts* or subcontracts only after consultation with the City Attorney to ensure the propriety and legality of the proposed action.

- (c) The City may continue to place orders against existing *contracts*, including *delivery contracts*, held by a *debarred* or *suspended person*, unless the *contract* has been terminated.
- (d) The City shall not renew or otherwise extend the duration of current *contracts*, or consent to subcontracts, with *debarred* or *suspended persons*, unless the City Manager states in writing the compelling reasons for renewal or extension.

("Effect of Debarment or Suspension on Existing Contracts" added 9-3-2002 by O-19093 N.S.)

§22.0826 Agreement Not to Bid in Lieu of One Year Debarment

The City may, but is not required to, offer a *person* the opportunity to execute a written agreement not to bid for one year, in lieu of the City's pursuing a one year debarment under this Division. By executing this agreement, the *person* shall consent to waive a *debarment* hearing as described in Section 22.0804, and this agreement will not constitute a debarment.

("Agreement Not to Bid in Lieu of One Year Debarment" added 9-3-2002 by O-19093 N.S.)