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OPINION NUMBER 96-2

DATE: October 1, 1996

SUBJECT: Review and Analysis of the Draft Predicate Study Prepared by DEGA/TMS for the Equal Opportunity Contract Program of the City of San Diego

REQUESTED BY: Jack McGrory, City Manager

PREPARED BY: John M. Kaheny, Assistant City Attorney

QUESTION PRESENTED

The City Manager has requested the City attorney to review and analyze the draft DEGA/TMS predicate study and to determine if the study should be accepted and used as the basis for a race and/or gender-based contracting program.

CONCLUSION

The draft DEGA/TMS study, and the earlier study by James M. Montgomery, Consulting Engineers, Inc., do not show sufficient evidence of intentional race or gender discrimination in the award of City of San Diego or City sponsored agency contracts to justify an enforceable race or gender-based contracting program. However, there is sufficient evidence of societal discrimination and economic hardship in the San Diego region to justify its use, along with other available information, in the design of a non-preferential outreach program that is consistent with the requirements of California Public Contract Code section 2000(a) (2) and San Diego City Charter sections 35, 94 and 100.

BACKGROUND

As a result of the September 28, 1993, ruling by the United States District Court of the Southern District of California, striking down, as unconstitutional, the City of San Diego's

Minority and Women Business Enterprise Program ("MBE/WBE"), the City Manager was directed to conduct a multi-agency disparity/predicate study to determine the extent of race or gender-based discrimination in the awarding of City or City sponsored agency public contracts. The study was awarded to the joint venture team of DEGA/TMS. A draft study was submitted to the City Manager who in turn forwarded the report to the City Attorney for review and analysis in January 1996.

In order to fully understand the complexities of this issue, especially in light of the developing law, a brief historical review of the City of San Diego's attempts to ensure equal opportunity in the award of City contracts is appropriate. For simplicity's sake, this legal analysis will be limited to determining if the DEGA/TMS study passes the strict scrutiny test applicable to MBE programs and not the lesser standard of intermediate scrutiny for WBE programs. In order to pass the strict scrutiny test, a race-based program must be based on a compelling state interest such as remedying past acts of racial discrimination. The intermediate scrutiny test requires somewhat less of an evidentiary burden on the sponsoring governmental agency..

On January 11, 1972, the City Council endorsed the concept of affirmative action in the areas of municipal employment and contract compliance and directed the City Manager and the Personnel Director, in conjunction with the Civil Service Commission, to develop an affirmative action program for Council consideration no later than February 1, 1972. Shortly thereafter, the Council adopted Resolution number R-274843, containing an affirmative action program for contractors doing business with the City. The purpose of the original program was the creation of increased employment opportunities for minorities and women on City-funded contracts.

This program resulted in two (2) separate five-year programs that were monitored by the City's Equal Opportunity Commission which had been established on November 12, 1975 with the express purpose to advise the Mayor, City Council, City Manager, Civil Service Commission, and other agencies of the City government of the progress being made in the Equal Opportunity Program adopted by the Council.

In 1980, the United States Supreme Court in Fullilove v. Klutznick, 448 U.S. 448, 65 100 S. Ct. 2758, 65 L.Ed.2d 902 (1980), approved the United States government's MBE program for federally funded public works projects. When the City's second five-year affirmative action program was about to conclude in 1984, a question arose as to whether the City of San Diego could adopt its own MBE/WBE program. These programs were designed to increase the participation in public contracting of business enterprises that were minority or women owned. Eligible businesses included prime contractors, subcontractors, consultants and vendors. The traditional MBE/WBE program did not concern itself with the racial or gender makeup of the business enterprise's workforce but only with the nature of the ownership of the enterprise. Initially, there was a presumption that racial and gender make up of the ownership of a firm was directly related to the race and gender makeup of the firm's workforce.

Experience has shown that this is not always the case. The traditional programs applied to highly successful and competitive minority firms as well as emerging enterprises.

In City Attorney Opinion No. 84-4, the City Manager was advised that the City of San Diego could give preferential consideration to minority business enterprises or women business enterprises only if two (2) conditions were met. First, the Council had to make specific factual findings of past racial or sexual discrimination on the part of the City in the awarding of such contracts. Second, the voters had to approve amendments to the competitive bidding provisions of the City Charter, authorizing the City to establish a narrow or remedial program designed to cure the effects of the past discrimination. Based on that advice, the City Manager drafted a proposed "minority and business enterprise program" and recommended changes to the Equal Opportunity Program for contractors doing business with the City of San Diego. That program, adopted by Resolution Number R-262633 on March 4, 1985, was a voluntary, non-preferential program which complied with the competitive bidding requirements of the Charter as set forth in sections 35, 94, and 100. These sections generally require the award of public works construction and vendor contracts through a competitive process to the lowest responsible bidder. Charter section 100 specifically prohibits any favoritism in the award of City contracts.

The City's initial MBE/WBE program established goals for awarding construction contracts to MBE's of fifteen percent (15%) and to WBE's of five percent (5%). Lower goals were set for consultant and vendor contracts. On February 22, 1988, the Council raised the goals for MBE's participation to twenty percent (20%) and WBE's to seven percent (7%). As was the case with the setting of the original goals, no evidence of MBE/WBE marketplace availability was presented to the Council at the time of adoption of the goals.

During this period of time the City also explored giving preferences to local business in the award of City contracts. This concept was not developed because of the difficulty in overcoming certain legal problems associated with local preferences, including the necessity for a Charter amendment. The City at one time did have a 5% local bidder preference in the Charter but it was repealed on September 21, 1966. Currently, City Council Policy 100-10 does give local vendors credit against the cost of a bid for any sales tax that is returned to the City.

In January of 1989, the United States Supreme Court in Richmond v. Croson, 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989), set forth the strict requirements needed in order for a state or a local agency race-based contracting program to survive a constitutional challenge. The Court initially stated that the local governmental agency must have a compelling interest to implement such a plan, such as remedying the effects of prior discrimination, and such a program would face strict scrutiny by the courts to ensure that it complies with the Equal Protection Clause of the Fourteenth Amendment. The Court also held that to pass the strict scrutiny test, any race-conscious contracting program must be supported by specific evidence of systematic prior discrimination in the affected contracting area either directly by the governmental entity or by the entity as a passive partner in a discriminatory scheme. The program must be necessary to

remedy specific discrimination which cannot be remedied by race-neutral methods and it must be narrowly tailored to accomplish those results. Plans which are adopted to encourage or facilitate minority participation in contracts or to remedy the general pattern of societal discrimination against certain minorities will not pass constitutional muster. The Court clearly indicated that any race or gender-based contracting program must be supported by probative evidence of past discrimination. Such probative evidence may include a disparity study.

Later in 1989, the San Diego City Charter Revision Commission forwarded to the Mayor and City Council a proposed charter amendment designed to overcome the strict competitive limitations of Charter sections 35, 94, and 100 and permit the City to enforce the provisions of the MBE/WBE program. It failed in the Rules Committee and was not placed on the ballot.

In early 1991, the City of San Diego's Clean Water Program chartered a study on the availability and capability of MBE/WBE construction firms for the Clean Water Program. The study was prepared for the Clean Water Program by James M. Montgomery, Consulting Engineers, Inc., in association with Brown and Coldwell, Consultants, MBS/Lowery Engineers and Planners, Incorporated, and Delon Hampton and Associates, Chartered. During this period, in an attempt to reach the goals established in February of 1988, City staff began the procedure of recommending the rejection of all bids when a construction contractor, who was the lowest responsible bidder pursuant to Charter section 94, had not reached the goals or had not, in the opinion of staff, made a good faith effort to do so. On March 13, 1992, in a Report to the Honorable Mayor and City Council, the City Attorney advised the Mayor and the Council of the precariousness of continuing this method of enforcing the MBE/WBE Program. On March 20, a group of consulting engineers threatened the City of San Diego with legal action if the City did not refrain from awarding extra points in the selection process to consulting firms who hired MBE/WBE firms as subcontractors. Ironically, this office had just two days earlier advised the City Manager's office in a Memorandum of Law that such a policy was constitutionally defective. This office subsequently advised the Mayor and the Council in a Report dated October 22, 1992, to modify this practice. As a result of negotiations with the consulting engineers and revisions to the City's program, the threat of that lawsuit disappeared.

Also on August 3, 1992, the City Council voted in concept to commission a "predicate-disparity study" to begin compliance with the legal requirements emanating from the Croson case. Shortly thereafter, on August 17, 1992, the draft capability and availability analysis of MBE/WBE construction contracts in the Clean Water Program was forwarded to the City Manager. Final direction to the City Manager to begin the selection process for the disparity study occurred on April 26, 1993. Two months later, the Association of General Contractors ("AGC") won a major victory in the United States Supreme Court. In Fla. Gen. Contractors v. Jacksonville, 508 U.S. 656 , 113 S. Ct. 2297, 124 L.Ed.2d 586 (1993), the Court held that under certain circumstances membership associations such as the AGC could have standing to bring suit on behalf of all of their members including subcontractors. Based on this authority, the

AGC, San Diego Chapter, filed for declaratory judgment and injunctive relief against the City of San Diego on August 4, 1993. Associated General Contractors of America, San Diego Chapter Inc., v. City of San Diego, No. 93-1152 (U.S. Dist. S.D. Cal.). On September 30, 1993, the Honorable Judith M. Keep, United States District Court Judge, for the United States District Court, Southern District of California, issued a preliminary injunction, later made permanent, enjoining the City of San Diego's MBE/WBE Program. Judge Keep indicated in her decision that the City's policy of rejecting all bids when there was a failure by the lowest responsible bidder to make a good faith effort to hire MBE/WBE subcontractors caused the program to be constitutionally impaired. It was the Judge's opinion that the City's program left prime contractors no other choice then to give preference to MBE subcontractors when soliciting bids on City public contracts. On November 29, 1993, the City Council rescinded Resolution Number R-262633. On the same day the Council awarded the contract for the predicate study to DEGA/TMS, a joint venture company.

In January 1995, the City Council adopted the Equal Employment Opportunity Outreach Program currently found in Section 22.2701 through 22.2708 of the San Diego Municipal Code. The purpose of this ordinance is to ensure that contractors doing business with the City of San Diego refrain from any discriminatory employment practices.

Later, on June 12, 1995, the United States Supreme Court decided the case of Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, ___ U.S. ____ , 132 L.Ed.2d 158 (1995). In that case, the Court applied the Croson standard of strict scrutiny to federal programs.

Meanwhile the subject of the viability of local MBE/WBE programs under California law was being debated. In December of 1994, the California Supreme Court in Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161 (1994), referred to herein as Domar I, upheld the MBE Program of the City of Los Angeles on the grounds that the Charter of Los Angeles expressly authorized the City and its contracting agencies to consider factors other than the lowest responsible bidder in the awarding of its contracts. In other words, it held that the Charter of Los Angeles did not prevent the City of Los Angeles and its agencies from requiring potential contractors to comply with a subcontractor outreach program that involved no bid preference, set aside or quota. The court however, was careful to point out that the contracting provision of the Charter of the City of Los Angeles contained many non-competitive provisions. The court than remanded the constitutional issues to the lower court for resolution. In Domar Electric, Inc. v. City of Los Angeles, 41 Cal. App. 4th 810, 822 (1995), referred to herein as DomarII, the court held that the good faith outreach provisions of Public Contract Code Section 2000(a)(2) did not violate the equal protection clause of the Fourteenth Amendment and were valid under the Croson decision. The court also held that California Public Contract Code section 2000 sets the standard for all MBE/WBE outreach programs for charter cities and is preemptive of all local programs in conflict with its provisions. It also held that the City of Los Angeles' program was consistent with Public Contract Code section 2000.

At about the same time in early January 1996, the City Manager forwarded the DEGA/TMS draft study to the City Attorney for review and analysis in order to determine whether or not the report could withstand the scrutiny of a legal challenge if the study were used as the basis for a race and/or gender-based program. As directed by the City Council the draft study covered the public contracting programs of other City sponsored participating agencies; Centre City Development Corporation, Mid-City Development Corporation, San Diego Data Processing Corporation, San Diego Housing Commission, San Diego Convention Center Corporation, Southeast Economic Development Corporation and the San Diego Redevelopment Agency.

After receiving the draft report, this office secured copies of the Montgomery Clean Water Program report and studies from two (2) other agencies to be used for comparison. One was the Oregon Regional Consortium Disparity Study, and the other was The Utilization of Minority and Women-owned Business Enterprises in Bexar County, Texas. The Bexar County study was prepared for the City of San Antonio, the City Water Board, and the VIA Metropolitan Transit Board. This office also obtained a copy of a United States Department of Justice Office of Legal Counsel Memorandum to General Counsels dated June 28, 1995, addressing the Adarand Constructors, Inc. v. Pena (supra) decision. Other insight was obtained by reviewing the eleven (11) reported federal court decisions concerning the MBE program of the City of Philadelphia. The latest of these decisions, Contractors Ass'n. of E. PA. v. City of Philadelphia, 893 F. Supp. 419 (E.D. Pa. 1995), outlines, in some detail, the necessary elements of a defensible disparity study.[1]

On April 29, 1996, the rule established in Domar II was reinforced by the holding in Monterey Mechanical Co v. Sacramento Regional County Sanitation Dist. 44 Cal. App. 4th 1391, 1400. The good faith efforts contained in California Public Contract Code section 2000(b) were once again held to be the exclusive criteria available to a MBE/WBE public contracting program.

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[1]In addition, much information was obtained from four (4) articles reported in the Summer 1994, Volume 26, Number 3, edition of the Urban Lawyer, entitled MBE and WBE Programs in the Post Croson Era, by Robert H. Freilich, David G. Richardson, and Roxanne Doyle; Opportunity Denied! New York State's Study of Racial and Sexual Discrimination Related to Government Contracting, by Hyman Frankel; Participation and Performance of Minority-owned (MBEs) and Women-owned (WBEs) Business Enterprises in the Port Authority's Prime Contract Markets, by Richard Roper; and Standards for the Second Generation of Croson Inspired Disparity Studies, by George R. Lanoue. It should be noted at this point that Dr. George R. Lanoue was the expert hired by the Association of General Contractors in the City of Philadelphia case.

Finally in June of 1996, the City's Equal Opportunity Contracting Program (EOCP) conducted its own survey to obtain feedback from the City's prime contractors and subcontractors concerning better ways to utilize minorities and women on City contracts. This report contains much insight into the economic, bureaucratic and structural problems facing MBE/WBE firms in the pursuit of public contracts.

ANALYSIS

(A) Introduction

The draft report submitted by DEGA/TMS consists of an executive summary, two (2) volumes of quantitative evidence, and one (1) volume of findings and recommendations. The purpose of this draft study was to determine the presence and, if necessary, the extent of race and gender-based discrimination in City of San Diego public contracting. The study was not designed to provide a conclusive answer to allegations of racial and gender discrimination in San Diego public contracting, but to be the first step in the process of establishing a proper evidentiary record of invidious discrimination. A complete record normally includes the predicate study, public hearings, affidavits, anecdotal evidence, and other probative evidence needed to make appropriate findings. The draft study also concedes that the methodologies employed in disparity studies are relatively new and subject to revision as the industry matures. For the reasons expressed below, the DEGA/TMS draft predicate study, while containing much useful information, suffers from several vulnerabilities which will most likely preclude its use as a cornerstone of a traditionally enforceable race or gender based program. In fact, the recommendations proposed by the DEGA/TMS team reflect this conclusion.

Preliminarily, it is important to note that, although the DEGA/TMS draft study describes a business environment in the San Diego region that is replete with discrimination arising from a variety of economic and social causes, the study does not recommend set asides, bid preferences or other forms of preferential treatment for MBE/WBE firms. This approach may be due to the apparent lack of any specific identifiable acts of discrimination by the City, its agencies or its contractors. The discrimination described in the study is more subtle and systematic as opposed to intentional. For example, the draft study makes great use of census tract housing ownership data in order to show an historic pattern of economic discrimination in San Diego. Other reasons for the disparities among ethnic groups in source of wealth, capital, household per capita income and occupational employment, such as the impact of recent immigration are addressed.

Nevertheless, the draft study does concede that the problems of the MBE/WBE community in the San Diego marketplace are complex and multifaceted. It makes detailed recommendations on how the City can influence the marketplace and thereby make the City's public contracting process more accessible to MBE/WBE firms. As set forth in the draft executive summary, those recommendations are:

(a) Develop and issue a strong policy statement from the Mayor, City Manager and City Council on MBE/WBE participation and business development.

(b) Establish annual participation goals for each ethnic group and women through a contract by contract goal-setting methodology.

(c) Increase the role of EOCP in budget preparation/approval and City planning functions.

(d) Formalize the role for EOCP in contract work scope development and bid packaging.

(e) Enhance technical and management support services assistance directed to targeted firms.

(f) Enhance human resource capacity of EOCP to include appropriate technical expertise (i.e. construction engineer) through in-house staff or consulting assistance to permit a review of technical issues.

(g) Develop a combination financing and bonding program which works in conjunction with private lenders and sureties

(h) provide diversity training for all City employees involved in the contracting process.

(i) Design and implement a "user-friendly" participation tracking system that:

1. Tracks prime and subcontractor participation by firm name and by payment, as well as award.
2. Accesses all accounting systems and other "tracking" systems used by the City and affiliated agencies.
3. Includes an advance projection of bid and award dates and outreach efforts which should link to the data base of "available" MBE/WBEs.
4. Tracks workforce participation by ethnicity and gender.
5. Includes a checklist for verification of data reported.
6. Tracks change orders and any other modifications affecting dollar values of projects.
7. Includes an automatic tickler requiring confirmation of final payment and total expenditures with fiscal accounting records.

(j) Make performance in program areas a specific part of the accountability factors in the performance appraisals of all personnel involved in the contract bid, award and monitoring functions.

(k) Provide departmental budget and other incentives allowing a sharing of savings realized by effective MBE/WBE program implementation.

(l) Increase aggressiveness of fair and equitable use of sanctions for non-compliance

(m) Commit sufficient human resources (staff and outside consultants) to effectively implement the full program.

(B) Methodology

In order for a disparity study to be credible, it must consist of relevant and focused evidence of present and past discrimination, base lines, specific remedies, reliable source data, and an impartial analysis. A defensible study needs only to raise a statistical presumption of discrimination in the relevant industries in order for the local agency to implement an enforceable MBE/WBE program. Nevertheless, if such a program is adopted by the agency, the study must be able to withstand a challenge at trial or the program will ultimately fail as was the recent case in the City of Philadelphia.

All disparity studies face certain common difficulties with the methodology of such studies. Generally speaking, the problem areas are availability ratios, utilization statistics, disparity ratios, anecdotal evidence, historical research, analysis of race neutral policies, logical inferences, and the adequacy of records and information. In a nut shell, disparity studies are complex and easily subject to criticism and impeachment unless they present all of the necessary elements in a credible fashion. In order to support a race based contracting program, the study must be able to articulate actual instances of discrimination, true availability of contractors, and the statistical evidence produced must be linked to additional evidence of discrimination by the local agency or its contractors.

As shown by the result of the court's decision in Contractors Ass'n of E. PA. v. City of Philadelphia, supra, in order to survive a legal challenge a disparity study must at a minimum:

1) make an independent assessment of the number of minority firms who were qualified, willing and able to perform contracts for the agency. Merely producing a head count of minority firms in their various occupation and trade groups will not suffice;

2) avoid improperly mixing data from different sources when calculating the disparity ratios;

3) rely on independently verified figures of availability of MBE/WBE firms rather than relying on the agency's own figures;

4) avoid relying too heavily on census data, which merely indicates the existence of firms but does not indicate their qualifications, willingness or availability to participate in agency contracts;

5) avoid making the assumption that all minority firms that were available and also qualified were willing to perform agency public works contracts without testing this assumption by examining the number of MBEs who sought, or actually bid on the contracts;

6) consider the amount of MBE participation on federal or state assisted construction projects;

7) verify the accuracy of any anecdotal evidence produced;

8) test any alternative explanations for disparity prior to concluding with any certainty of what caused a disparity;

9) address the actions the agency has historically taken to avoid discrimination in public contracting;
10) measure minority participation in other public contracting projects within the region in order to assess its impact on any availability of minority contractors;
11) examine any evidence of racial discrimination in the region's construction industry that is located either in court files or with other civil rights enforcement agencies;
12) produce some objective evidence of discrimination in the construction industry.

Because of the limited funding available to the City of San Diego and the other participating agencies, the DEGA/TMS study focused only on City of San Diego and City sponsored agencies' contracting efforts within the San Diego Metropolitan Statistical Area (MSA). A regional study which would have encompassed the utilization of MBE/WBE's by all public agencies throughout the San Diego MSA was financially unobtainable. A complete regional approach such as that used by the Bexar County and the Oregon Regional Consortium studies would have been much more helpful. This inability to access information concerning MBE/WBE availability and utilization from the federal government, California Department of Transportation, the San Diego Unified Port District, the County of San Diego, the various San Diego School Districts, and the numerous cities and other local agencies of San Diego County severely impaired the DEGA/TMS team's ability to analyze and report on other causes of the underutilization or non-availability of MBE/WBE's for City of San Diego contracts. A key factor in evaluating the availability of minority firms for City of San Diego contracts is the effect of other agencies' affirmative action or equal opportunity programs. One reason for the City's recent low utilization rate of MBE/WBE firms could very well be the decision by MBE/WBE firms to bid on projects that have mandatory set-asides for MBE/WBE participation or have prevailing wage requirements, rather than to bid on City of San Diego contracts which do not have these same incentives.

The DEGA/TMS team conducted a survey of 10,000 firms that had expressed interest in doing business with the City and the City sponsored agencies. Of the 941 responses, 901 were found to be valid and were used by the study as supplemental to the anecdotal evidence obtained in the eighty-seven (87) interviews. In addition to general anecdotal complaints about the ongoing existence of employment discrimination in the region, many other impediments to the utilization of MBE/WBE were described. Many of the comments were similar to those found in the earlier Montgomery Clean Water Program survey.

The DEGA/TMS team did not reference the Montgomery Clean Water Program study the draft predicate study. Although the Montgomery survey was a much more narrow survey, it contains a wealth of information concerning availability ratios by individual trade group. The Montgomery survey was mailed to 1400 MBE/WBE construction firms. While only 10% of the MBE/WBE construction firms in and outside of San Diego County responded to the survey, the Montgomery study was able to make specific findings of the availability of MBE/WBE construction firms by individual trade. The Montgomery study found that there were adequate

experience levels in the electrical, concrete, and highway construction trades, but limited MBE/WBE capacity in drywall, fencing, painting, and nine (9) other trade categories. The study also found no MBE/WBE capacity in glazing and refrigeration. Ironically, according to the survey, one specialized MBE concrete contractor, who had found a "unique niche" in the City's contracting opportunities, received 500 contracts for the City of San Diego while the next most successful MBE who responded to the survey, obtained only 25. This study was conducted in 1991 and it resulted in the development of a somewhat accurate MBE/WBE availability database for the types of firms that could be used by the Clean Water Program. Unfortunately, the focus of the Montgomery survey was on individual trades, so it is difficult to reconcile its results with the more general DEGA/TMS draft study.

One of the other difficulties facing the DEGA/TMS study team was the necessity, for lack of other verifiable data, to rely on utilization statistics generated by a program that was later found by Judge Keep to give unlawful preferences to minority firms. It is unlikely that the ratios developed from this tainted data would be accepted by any court as a credible baseline for future utilization ratios. The same is true for the consultant utilization ratios that rely on the unlawful preferences in effect prior to 1993.

The DEGA/TMS consultants were also impeded by the nature of the record keeping process of the City and its agencies. Record keeping was especially inconsistent in the early years of the City's original MBE/WBE program. For example, the reporting of the dollar value or the number of contracts awarded to MBE/WBE firms did not necessarily give an indication of how many MBE/WBE firms participated in the process. As previously indicated, the Montgomery study explained in detail the lack of correlation between the number of contracts awarded and the actual number of MBE/WBE firms receiving contracts. The same is true when tracking the dollar value of contracts. In other words, if the purpose of a program is to increase business opportunities and employment in certain sectors of the community, the more accurate indicator is the number of separate firms that receive contracts over a defined period of time, not the amount of work awarded to a select few.

The DEGA/TMS draft study is also vulnerable to criticism because its historical analysis did not articulate the effect of the recent changes in the immigration pattern for the San Diego region. For example, in its discussion of the history of race and gender discrimination it make no mention of the large number of refugees from a variety of Third World countries who have settled in San Diego in the last twenty years. Many of these individuals are not members of the traditional identifiable minority groups. It also failed to discuss any of the City of San Diego's efforts since 1972 to abolish discrimination in public contracting. In fact, its historical analysis of San Diego ends prior to the Civil Rights Movement of 1960s. The study therefore does not address the impact of the various legislative programs at the federal, state and local levels, which prohibit discrimination in public sector contracting. It also does not reflect the activities of the Citizens Equal Opportunity Commission, City's Human Relations Commission, or the Human Relations Commission of the County of San Diego. The study also does not describe the

presence of any litigation in San Diego County related to discrimination in the awarding of public contracts, nor explain its absence.

Although the draft study relates much anecdotal evidence concerning problems with MBE/WBE firms obtaining City contracts, it admits that time and money constraints precluded verifying this information. However, the recent survey conducted by EOCP does verify that there are still a large number of social and economic impediments in the marketplace that adversely affect small or undercapitalized MBE/WBE firms' ability to participate in the marketplace. Theses same factors also affect the creation of new MBE/WBE firms. The study seems to indicate that, absent these factors, more MBE/WBE firms would be available for City contracts. Yet there is no way to prove that an emerging firm would be of the type that would be ready, willing and able to work on City contracts. Furthermore, the recent EOCP survey results do not give much credence to the numerous allegations of racial discrimination reflected in the anecdotal evidence provided in the DEGA/TMS draft study.

The Montgomery study explains in some detail the experience level of various MBE/WBE firms desiring to do business with the City or its prime contractors. The DEGA/TMS draft study does not give such detail. However, both studies address the difficulties that many MBE/WBE firms have in obtaining work on City contracts that have little to do with invidious discrimination, such as bonding requirements, contract size, available financing, insurance requirements and the nature of the work to be performed. For example, there are numerous MBE/WBE firms in the City that specialize in areas foreign to the City's contracting needs and are therefore simply not available to participate in the City's program. Both studies do agree that a way to increase MBE/WBE participation in the awarding of City contracts is to make the process more friendly to emerging businesses. The DEGA/TMS recommendations are helpful in this regard.

While the draft study clearly shows that there is societal and economic discrimination in the San Diego marketplace, its failure to articulate any specific discriminatory practices on behalf of the City of San Diego, its sponsored agencies or contractors will preclude the City or its sponsored agencies from enacting set asides or bid preferences. However, many of the DEGA/TMS recommendations, if implemented, would have an ameliorating effect on the effects of societal and economic discrimination in public contracting in the San Diego region.

(C) The DEGA/TMS Recommendations

An important factor affecting the recommendations proposed by the DEGA/TMS draft study is the absence or scarcity of ready, willing and able MBE or WBE firms in several trades in the San Diego marketplace. This lack of availability directly affects the utilization rate, especially when other public agencies in the San Diego region may operate under regulatory schemes more favorable to MBE/WBE firms. The fact that the draft study's recommendations are designed not to grant preferences but to increase participation in the process by MBE/WBE

firms indicates that its authors are aware of the complexity of this issue and the economic difficulties facing emerging MBE/WBE firms.

When drafting the proposed recommendations, the DEGA/TMS team drafters did not have the benefit of the newly emerging case law concerning the impact of Public Contract Code section 2000 on charter cities as expressed in Domar I and Domar II, supra. Under current California law, if a city enacts an MBE/WBE program consistent with its charter, the program must also be consistent with and not in conflict with the applicable requirements of Public Contract Code Section 2000. In that regard, some of the recommendations of the DEGA/TMS study must be adjusted to comport with the principles articulated in Domar I and Domar II, supra. The City sponsored agencies, not being bound by the very specific competitive provisions of the San Diego City Charter, can quite easily adopt the good faith effort standards of Public Contract Code section 2000(a)(2) into the appropriate bid specifications and reject a bid for failure of compliance. The City of San Diego, being bound by Charter sections 35, 94 and 100, is in a more difficult position. It is not likely that a court would interpret the strict competitive language of the City of San Diego Charter as permitting the rejection of an otherwise low and responsible bid for noncompliance with the good faith effort requirements of Public Contract Code Section 2000(a) (2). This issue could be conclusively resolved by amending the relevant sections of the Charter. There is a caveat, however. Any program based on Public Contract Code section 2000 must avoid the constitutional defect of the City's earlier program and not force prime contractors into preferring MBE/WBE subcontractors to the exclusion of other majority owned contractors. The program must be designed to increase rather than restrict competition. As the California Supreme Court stated in Domar I, supra at page 173:

> As one leading treatise explains: "The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. These provisions are strictly construed by the courts, and will not be extended beyond their reasonable purpose . . . Thus, charters requiring competitive bidding are not to be given such a construction as to defeat the object of insuring economy and excluding favoritism and corruption. Citations omitted.

SUMMARY

The DEGA/TMS and Montgomery studies describe in great detail the complexities of identifying the causes of economic disparity among racial groups in a large community. This is especially true in areas, such as San Diego, that are experiencing rapid demographic changes. The problems facing emerging and existing MBE/WBE firms in the current economic environment are significant and not easily resolved. Unfortunately, identifying easily remedied acts of invidious race or gender discrimination is far from an easy task. Disparity or predicate studies, in their current form, are not yet the best tool for this task. As indicated herein, they are often flawed and leave themselves vulnerable to legal challenge when used as the cornerstone for a race or gender based program. However, if properly used, they can provide a basis for designing local governmental programs that ameliorate the effects of long term economic and social discrimination.

In this regard, the combined DEGA/TMS and Montgomery studies provide sufficient information for the development of a non-preferential program that focuses on increasing competition for public contracts by all participants in the marketplace. Furthermore, encouraging MBE/WBE firms to participate in such a program is well within the legal authority of the City of San Diego, and its sponsored agencies.

Respectfully submitted,

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