



MEMORANDUM

DATE: April 27, 2015

TO: Members of the Planning and Budget Committee

FROM: Lawrence C. Yee, Acting General Counsel
Dina E. Goldman, Acting Chief Assistant General Counsel
Erika K. Leighton, Assistant General Counsel
Amy C. Anderson, Acting Legal Assistant

RE: Diversity in Contracting Analysis

Summary:

The State Bar is a governmental entity and is subject to state and federal anti-discrimination laws, including Proposition 209 and the Equal Protection Clause. Proposition 209 prohibits any preferential program based on race or gender in public contracting, including targeted outreach efforts. Under the Equal Protection Clause, preferential programs based on gender or race are subject to strict scrutiny which requires a compelling governmental interest and a narrowly tailored program to advance the governmental interest. Despite Proposition 209 and the Equal Protection Clause, certain race- and gender-neutral outreach and preference programs are effective ways to promote diversity in public contracting.

The Office of General Counsel was asked to review the post-Proposition 209 programs of major municipalities to promote diversity in their contracting. We examined the programs of six cities: Los Angeles, San Francisco, San Jose, Sacramento, San Diego, and Fresno. These cities provide examples of successful programs and are discussed in detail below.¹

General Overview:

¹ Los Angeles, San Francisco, San Jose, and Fresno also have programs through the Minority Business Development Agency (MBDA) in the U.S. Department of Commerce. The MBDA helps create and maintain U.S. jobs by promoting growth and competitiveness of large, medium, and small minority owned businesses. Because MBDA is federally funded, it is not addressed in this memorandum.

The California Civil Rights Initiative, also known as Proposition 209, amended the state constitution in November 1996 to provide: “The state shall not discriminate against, or grant preferential treatment in the operation of public employment, public education, or public contracting.” (Cal. Const., art. I, § 31 subd. (a).) Proposition 209’s definition of state includes “any governmental instrumentality of or within the state.” (Cal. Const., art. I, § 31 subd. (f).) The State Bar qualifies as a government instrumentality of the state because it is a public corporation established to perform governmental functions to further the administration of justice.² (Bus. & Prof. Code, §§ 6001 et seq.) It is also a constitutional agency established in the judicial branch of state government. (Cal. Const., art. VI, § 9.)

Any quota or targeted outreach efforts would likely violate Proposition 209. (See *Hi-Voltage Wire Works v. City of San Jose* (2000) 24 Cal.4th 537; *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315.) While some types of outreach may be lawful, there is little guidance from the courts and it is unclear what types of outreach efforts or preferential programs utilized in the State Bar contracting process would be consistent with Proposition 209. The following section describes data collection and outreach efforts by utilized by several municipalities to increase diversity in public contracts. Each program primarily focuses on data collection. Where preferences are given, such preferences are limited to neutral categories such as small and local businesses.

Major Municipality Contract Bidding:

1. LOS ANGELES:

- The Business Inclusion Program (“BIP”) was created January 12, 2011, by Mayor Villaraigosa in Executive Directive No. 14³. Under BIP, vendors who wish to contract with the City of Los Angeles sign up and become certified for the bidding process with the Los Angeles Business Assistance Virtual Network (“BAVN”). By making City contracts available online, all businesses have equal opportunity to contract with the City. The BAVN website provides certification and lists the bid opportunities available in the City. The City certifies businesses based on qualifications for the following:⁴
 - ✓ DBE-Disadvantaged Business Enterprise;
 - ✓ MBE-Minority-Owned Business Enterprise;
 - ✓ WBE-Women-Owned Business Enterprise;
 - ✓ SLB-Small Local Business;
 - ✓ LBE-Local Business Enterprise;
 - ✓ SBE-Small Business Enterprise;
 - ✓ EBE-Emerging Business Enterprise;
 - ✓ DBVE-Disabled Veteran Business Enterprise; and

² The State Bar was included among the class defendants in an unsuccessful class action challenging the enforcement of Proposition 209. See *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480, 1490 n. 6 (1996), vacated, 122 F.3d 692 (1997).

³ <http://www.losangelesworks.org/resources/BusinessInclusionProgramOverview.cfm>.

⁴ <http://www.labavn.org/index.cfm?fuseaction=home.faq&CFID=834063&CFTOKEN=1eafacc50fdd7ba0-A5519379-5056-8E03-78B42430E29FB620#cert3>

- ✓ OBE-Other Business Enterprise.

Prospective City contractors have mandatory subcontracting minimums and must engage in and document outreach efforts to a minimum number of MBE, WBE, OBE, SEB, EBE, and DVBE subcontractors, as determined by the contracting Department, through Business Inclusion Outreach (BIO). BIO is verified by applying criteria known as the Business Inclusion Outreach Criteria (“BIO Criteria”) and demonstrates a good faith effort by the prime contractor. The BIO Criteria requirements are waived if the prime contractor is a certified SBE, EBE, or DVBE.

- The Office of Contract Compliance (OCC) is responsible for ensuring that all contractors doing business with the City comply with City, State and Federal requirements relating to affirmative action, living wage, equal benefits, service contractor worker retention, slavery disclosure, prevailing wage, subcontractor outreach & the certification for minority, women and disadvantaged business enterprise.

2. SAN FRANCISCO:

- Since September 1, 2006, the City of San Francisco has implemented the Local Business Enterprise and Non-Discrimination in Contracting Ordinance (“Ordinance”).⁵ The Ordinance provides bid discounts or bonus ratings to LBE prime contractors and requires prime contractors to subcontract a portion of each covered contract to LBEs.⁶ The LBE Ordinance assists small businesses competing for city contracts exceeding \$10,000. It requires good faith effort to solicit and obtain bids from the broadest possible range of LBEs, including dividing contracts into smaller parts, outreach and advertising, and providing subcontracting opportunities, bid discounts, and other assistance in accordance with legislatively defined programs. The Ordinance further requires quarterly reporting to the Board of Supervisors that documents each City department’s performance under the Ordinance, including progress in meeting LBE goals and ensuring non-discrimination against MBEs, WBEs, and OBEs, and the success of each department’s prime contractors in complying with the LBE subcontracting provisions and ensuring non-discrimination. The report also requires the level of participation of all categories of LBEs.
- The Ordinance is administered and monitored by the City’s Contract Monitoring Division (CMD) of the City Administrator’s General Services Administration (GSA). CMD performs the following services:
 - ✓ Certifies qualified entities to become LBEs;
 - ✓ Sets LBE participation goals and monitors solicitation and selection processes;
 - ✓ Conducts workshops and provides technical assistance;
 - ✓ Facilitates the Bonding and Financial Assistance Program;
 - ✓ Determines pre- and post-award compliance;

⁵ SF Administrative Code, Chapter 14B, available at http://sf-hrc.org/sites/sf-hrc.org/files/migrated/FileCenter/Documents/LBE_EBO/LBE/APPLICABLE_14B_LAWS/CHAPTER_14B_LOCAL_BUSINESS_ENTERPRISE_AND_NON_DISCRIMINATION_IN_CONTRACTING_ORDINANCE.pdf.

⁶ <http://sfgsa.org/index.aspx?page=6133>.

- ✓ Tracks and reports City departments' LBE participation; and
- ✓ Investigates, mediates and resolves certification and compliance complaints, including payment issues.

The Local Business Program certification and compliance is overseen by the City Administrator's Office of CMD.

- A 14 member Local Business Enterprise Advisory Committee ("LBEAC"), appointed by Mayor Ed Lee on January 15, 2014, oversees the Ordinance and advises the City Administrator and the Director of CMD as to implementation and proposed amendments to the Ordinance.
- In addition to the required broad outreach to LBEs, the Ordinance requires the City to monitor the administration of City contracts, including the selection of subcontractors in order to prevent unlawful discrimination in the selection of subcontractors, and to identify and correct unlawful practices.⁷ "For public work/construction, architect/engineering, professional service, and general service contracts which the contract awarding authority reasonably anticipates will include subcontractor participation, prior to the solicitation of bids or proposals, the Director shall assemble data regarding the availability of MBEs, WBEs and OBEs to provide work that is likely to be subcontracted. The Director, in the Director's sole discretion, shall determine the appropriate methodology."⁸ Bidders are required to undertake all required good faith efforts outreach steps in such a manner as to ensure that MBEs, WBEs, and OBEs are not unfairly or arbitrarily excluded from the required outreach.⁹
- The Office of Contract Administration ("OCA") manages the city's vendors and the database listing of all bids and contracts of the contracting departments.¹⁰ The database includes contracts that have Local Business Enterprise ("LBE") subcontracting goals.¹¹ Depending on the services offered, the vendor is provided links to department websites posting bid and contract opportunities. Procurement of goods and services is mandated by the City of San Francisco's Rules and Regulations of the Administrative Code, Chapter 21 and requires compliance with Chapter 14.¹²

3. SAN JOSE

⁷ See SF Administrative Code, Chapter 14B, section 14B.9, available at http://sf-hrc.org/sites/sf-hrc.org/files/migrated/FileCenter/Documents/LBE_EBO/LBE/APPLICABLE_14B_LAWS/CHAPTER_14B_LOCAL_BUSINESS_ENTERPRISE_AND_NON_DISCRIMINATION_IN_CONTRACTING_ORDINANCE.pdf, at pp. 15-16.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ City of San Francisco <http://sfgsa.org/index.aspx?page=4758>

¹¹ San Francisco LBE Ordinance

<https://www.sfdph.org/dph/files/hc/HCFinance/agendas/2014/Nov%204/LBE%20Presentation%20Health%20Commission%2010-30-14.pdf>

¹² San Francisco Administrative Code, Chapter 21 <http://sfgsa.org/modules/showdocument.aspx?documentid=702>

- Effective June 18, 2004, the City of San Jose adopted Ordinance 27136, establishing the Local and Small Business Preference Policy for procurement of supplies, equipment, materials, services, and information technology, which provides a bid discount for LBEs and SBEs.¹³
- Bid opportunities and procurement solicitations are posted on BidSync where vendors register their businesses.¹⁴ Business may be registered as LBEs and SBEs for bid discounts where the basis of the award is price or “best value” determinative.¹⁵

4. SACRAMENTO

- The City of Sacramento’s Procurement Services is responsible for the City’s contract administration.¹⁶ The City uses an electronic bid database called PlanetBids for all vendors who wish to bid on contracts. All bid opportunities are posted on the site. The site includes a list of “prospective vendors” which are vendors who have completed the registration and qualify for bidding. Beginning April 2012, the Sacramento City Council adopted the Local Business Enterprise Preference Program for public projects and city contracts, with no federal funds used. Under the Program, the City may establish minimum levels for participation in contract or agreement by LBEs. Bids are broken down into categories by amounts and local businesses are given a 5% preference. Vendors located within the Sacramento City limits are given a 1% preference on taxable purchases.
- The City of Sacramento requires any contractor bidding on a contract amount exceeding \$100,000 to provide the city with documentation and information verifying compliance with Sacramento City Code Chapter 3.54, Non-Discrimination in Employee Benefits.

5. SAN DIEGO

- The City of San Diego provides contractors the opportunity to register and apply for contracts through the PlanetBids website. The City’s Equal Opportunity Contracting Department¹⁷ works to provide greater opportunity to local businesses through the Small Local Business Enterprises (“SLBEs”) Program. Adopted in 2010, the program seeks to provide a race- and gender-neutral tool for the City to ensure the local business community participates in City contracts through restricted bidding, bid discounts, and preference points when bidding on City contracts. This applies to Emerging Local Business Enterprises (“ELBEs”) as well. The Goal Setting Committee (“GSC”) implements the rules under the SLBEs policies.

6. FRESNO

¹³ <https://www.sanjoseca.gov/index.aspx?NID=4462>

¹⁴ City of San Jose <http://www.sanjoseca.gov/index.aspx?NID=764>

¹⁵ City of San Jose <http://www.sanjoseca.gov/index.aspx?NID=764>

¹⁶ City of Sacramento <http://portal.cityofsacramento.org/Finance/Procurement>

¹⁷ City of San Diego <http://www.sandiego.gov/eoc/programs/slbe.shtml>.

- In 2012, the Fresno City Council recognized the Purchasing Division, staffed by 9 people and responsible for all of the City's procurement. The city of Fresno posts bidding opportunities and requires vendors to register and be certified through PlanetBids.¹⁸ Contract award notices are posted on the City's website. The city provides seminars in the form of a PowerPoint presentation for Disadvantaged Business Enterprises ("DBEs").

Possible Ways to Increase Diversity in State Bar Contracts:

There are several potentially permissible methods to increase diversity in the State Bar's contracts, including adopting procurement methods that are similar to those utilized by the municipalities discussed above. These policies include preferences or outreach to small or micro-businesses, local or geographic preferences, requirements that prime contractors subcontract with small or local businesses, and preferences to businesses that hire local and/or low-income residents. Data collection is also a helpful tool in increasing diversity. If in a given procurement, the State Bar does not award a contract to a MBE or WBE, the State Bar could analyze information concerning the relative range and ranking of the MBE's and WBE's bid compared with the successful bid. The State Bar could also gather information to evaluate whether groups are unfairly excluded from State Bar contracts and which, if any, of the methods employed by the State Bar are increasing diversity.

¹⁸ City of Fresno

<http://www.fresno.gov/Government/DepartmentDirectory/Finance/Purchasing/BidOpportunities.htm>