

RESOLUTION NO 67002

**A RESOLUTION OF THE COUNCIL OF THE
CITY OF SAN JOSE ADOPTING A
NONDISCRIMINATION/NONPREFERENTIAL
TREATMENT PROGRAM APPLICABLE TO
CONSTRUCTION CONTRACTS IN EXCESS
OF \$50,000**

WHEREAS, the United States Supreme Court has established that public agencies are justified in taking certain remedial actions to remedy evidence of past discrimination against minority and women-owned businesses in public contracting; and

WHEREAS, in 1990, the City of San Jose conducted a Disparity Study which provided evidence of a disparity in the amount of contract dollars going to minority and women owned businesses in City construction projects; and

WHEREAS, the Disparity Study provided evidence that discriminatory practices existed in construction contracting and supported the need for the City to adopt an Minority Business Enterprise/Women Business Enterprise (MBE/WBE) Program for construction projects; and

WHEREAS, the City's MBE/WBE Program is a program which requires prime contractors to demonstrate that they have not engaged in discrimination against minority or women owned subcontracting businesses by including MBE/WBE subcontractors in contracting opportunities or by making good faith efforts to include such businesses in public contracting; and

WHEREAS, Proposition 209, approved by the voters on November 5, 1996, provides that local agencies shall not discriminate against or grant preferential treatment to any individual

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or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public contracting; and

WHEREAS, it has been, and continues to be, the policy of the City of San Jose through its MBE/WBE Program for Construction Contracts that no discrimination or preferences shall be permitted in the subcontracting of City construction contracts; and

WHEREAS, the City Council desires to adopt a Program to clarify this policy and to require that contractors demonstrate that they do not discriminate against MBE/WBE subcontractors in accordance with the law.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of San Jose:

SECTION 1.

The City of San Jose hereby adopts a City of San Jose Nondiscrimination/Nonpreferential Treatment Program Applicable to Construction Contracts in excess of \$50,000. The Nondiscrimination/Nonpreferential Treatment Program shall not apply to projects which are federally funded and which are subject to Resolution No. 67001.

SECTION 2.

The City of San Jose Nondiscrimination/Nonpreferential Treatment Program for Construction Contracts in excess of \$50,000 is attached to this Resolution as Attachment A

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and shall be incorporated and made part of the Special Provisions applicable to public works projects in accordance with this Resolution.

ADOPTED this 21st day of November, 1996, by the following vote:

AYES: DANDO, DIAZ, FERNANDES, FISCALINI, JOHNSON,
POWERS, SHIRAKAWA, WOODY; HAMMER

NOES: DIQUISTO, PANDORI

ABSENT: NONE



SUSAN HAMMER, Mayor

ATTEST:


PATRICIA L. O'HEARN, City Clerk

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11/21/96**ATTACHMENT A****NONDISCRIMINATION/NONPREFERENTIAL TREATMENT PROGRAM
APPLICABLE TO
CONSTRUCTION CONTRACTS IN EXCESS OF \$50,000****STATEMENT OF PURPOSES**

It is the Policy of the City of San Jose that **no discrimination or preferences** shall be permitted in the subcontracting of City construction contracts. All contractors shall fully comply with Chapter 4.08 of the San Jose Municipal Code and shall not discriminate against or grant preferential treatment to, any subcontractor on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin, in the performance of City contracts. Any contractor who so discriminates or gives preferences shall be deemed not to be a responsible bidder in accordance with Charter Section 1217.

Studies have demonstrated that there has been an historical pattern of discrimination against certain minority groups and women by contractors in the subcontracting of public works contracts. This program is intended to assure that there is no discrimination against MBE/WBE subcontractors and that there is no deliberate or inadvertent preference given to any subcontractors on the basis of race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin. Therefore, City contracts in excess of \$50,000 require specific documentation of this aspect of responsibility. Failure to provide the required documentation shall render a bid nonresponsive.

SECTION I--GENERAL REQUIREMENTS

These provisions, entitled, **NONDISCRIMINATION/NONPREFERENTIAL TREATMENT PROGRAM APPLICABLE TO CONSTRUCTION CONTRACTS IN EXCESS OF \$50,000**, are incorporated in and made part of the Special Provisions for such public works projects.

ALL BIDDERS WILL BE REQUIRED TO SIGN THE FOLLOWING STATEMENT:

In listing subcontractors in this bid, I have not discriminated or given any preference to **any** firm based on race, sex, color, age, religion, sexual orientation, disability, ethnicity, or national origin. I understand that any such discrimination or preference is in violation of Chapter 4.08 of the Municipal Code.

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FAILURE TO DEMONSTRATE NONDISCRIMINATION/NONPREFERENTIAL TREATMENT AS DESCRIBED BELOW, IN THE HIRING OF SUBCONTRACTORS SHALL RENDER A BID PROPOSER NONRESPONSIVE.

A BIDDER IS FREE TO SELECT EITHER OF TWO ALTERNATIVES TO DEMONSTRATE THAT THE BIDDER HAS NOT DISCRIMINATED IN LISTING SUBCONTRACTORS:

1. THE BIDDER MAY CHOOSE TO PROVIDE DOCUMENTATION AS DESCRIBED BELOW THAT DEMONSTRATES OUTREACH AND THE BREAKING DOWN OF BARRIERS (SECTION IV, Alternative 1).

OR

2. THE BIDDER MAY CHOOSE TO PROVIDE DOCUMENTATION OF NONDISCRIMINATION BY PROVIDING DOCUMENTATION OF PARTICIPATION. (SECTION IV, Alternative 2.)

THE CITY WILL NOT CONSIDER WHICH ALTERNATIVE THE CONTRACTOR HAS CHOSEN TO SUBMIT WHEN EVALUATING THE BID FOR PURPOSES OF AWARDING THE CONTRACT.

SECTION II--MBE/WBE CERTIFICATION

For purposes of this program, MBE/WBEs, are those firms which, based on the race, ethnicity or gender of the owners, fall into a category shown by a disparity study to have been subject to historical discrimination. AN MBE/WBE business must be certified before credit may be allowed toward the documentation of participation for this contract. To be qualified MBE/WBEs must be certified as follows:

1. Certified by the City Manager or his/her designee, the Director of the Office of Equality Assurance (formerly Affirmative Action/Contract Compliance).
2. CALTRANS MBE/WBE certified businesses who also meet City of San Jose Program Requirements as contained in the Minority and Women Business Program Definition and Eligibility Criteria.

3. The City of San Jose MBE/WBE Directory identifies MBE/ WBEs which have been formally certified by the Office of Equality Assurance . An electronic version of the MBE/WBE Directory may be found on Virtual Valley a computer accessed on-line service available to San Jose residents at no charge.

SECTION III-- BID OPENING

At the time of bid opening, a contractor must submit adequate documentation of nondiscrimination/nonpreferential treatment to the Office of the City Clerk.

SECTION IV--NONDISCRIMINATION/NONPREFERENTIAL TREATMENT AND DOCUMENTATION

If the bid documents do not include adequate documentation of nondiscrimination/nonpreferential treatment, the bid will be declared non-responsive. The Contractor may choose from either of the Alternative ways of demonstrating nondiscrimination/nonpreferential treatment described below:

ALTERNATIVE 1. DOCUMENTATION OF OUTREACH

To sufficiently document nondiscrimination/nonpreferential treatment, under this Alternative the bidder shall make and document that **all** of the following steps have been taken in attempting to elicit MBE/ WBE proposals and to prevent discriminatory barriers.

1. The bidder attended any presolicitation or pre-bid meetings that were scheduled by the City to inform all bidders of the nondiscrimination/nonpreferential treatment program requirements for the project for which the contract will be awarded. The City may waive this requirement if it determines that the bidder is informed as to those program requirements by attending a City sponsored training program on nondiscrimination/nonpreferential treatment practices.
2. The bidder identified and selected portions of the work which can appropriately be broken down into economically feasible units to facilitate participation by smaller firms in order to assure that there is no discriminatory intent created by sizing the work in a manner which precludes MBE/WBE participation.
3. The bidder advertised, not less than 10 calendar days before the date the bids are opened, in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media, on a list approved by the City.

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The above paragraph applies only if the City gave public notice of the project not less than 15 calendar days prior to the date the bids are opened.

4. The bidder provided written notice by certified mail return receipt requested, or by FAX transmittal, of his or her interest in bidding on the contract to not less than four minority or women business enterprises in each appropriate trade or area of work at least 10 calendar days prior to the opening of bids. (Bidders are encouraged to provide written notice to as many firms as possible).

The City of San Jose has prepared a roster of MBE/WBE firms in the greater San Jose area. A copy of this listing can be obtained from the Office of Equality Assurance or is available electronically via Virtual Valley, a computer accessed on-line information service. Contractors, however, are in no way limited to the firms in this roster nor are such contractors, in any way, preferred.

5. The bidder followed up initial solicitations of interest by contacting the MBE/WBE firms to determine with certainty whether these enterprises were interested in proposing to perform specific items of the project.
6. The bidder provided all interested potential subcontractors with information about the plans, specifications, and requirements for the selected subcontracting or material supply work.
7. The bidder requested assistance from minority and women community organizations; minority and women contractor groups; local, state or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of minority or women business enterprises, if any are available.
8. The bidder negotiated in good faith with the interested minority or women business enterprises, and did not unjustifiably reject as unsatisfactory bids prepared by any minority or women business enterprises, as determined by the City.
9. Where applicable, the bidder advised and made efforts to assist interested potential subcontractor in obtaining bonds, lines of credit or insurance required by the City or contractor.

ALTERNATIVE 2. DOCUMENTATION OF PARTICIPATION

The Office of Equality Assurance shall set the percentage of the MBE firms and the WBE firms that would be expected to be included in any contract in the absence of discrimination

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as the evidentiary presumption. The evidentiary presumption can be met through documenting the participation of, MBE/WBE subcontractor(s), supplier(s) or trucker(s) or any combination thereof for any of the work embraced herein.

Credit for an MBE/WBE vendor of materials or supplies is limited to 60 percent of the amount to be paid to the vendor for the material unless the vendor fabricates, manufactures or substantially alters the product or item, in which case 100% credit is allowed.

One hundred percent credit shall be allowed for MBE/WBE truckers when a MBE/WBE trucker will perform the trucking with his/her own trucks, tractors and employees. This trucker credit is based on labor and operations and shall not include the cost of materials.

Credit will be limited to 20% for all MBE/WBE companies determined by the City to be acting as brokers.

Documentation of Participation is Required At Bid Opening

The bidders shall submit MBE/WBE information to the City Clerk's Office and such information is subject to verification by the City.

1. MBE/WBEs must have been certified by the time of bid opening

Note: The City of San Jose cannot guarantee certification review of new applications prior to bid opening. Bidders are encouraged to confirm certification status prior to listing an MBE/WBE on the bid documents.

The following information must be submitted with the contractor's bid:

2. **Name, address, and dollar value of all MBE/WBE subcontractor(s), supplier(s), and trucker(s) to be used in excess of 1/2 of one percent (1%) of the contractor's total bid amount, if the contractor wants such amount(s) counted towards the evidentiary presumption;**
3. **Name, address, and dollar value of all MBE/WBE subcontractor(s), supplier(s), and trucker(s) of less than 1/2 of one percent (1%) of the contractor's total bid amount, and MBE/WBE second tier subcontractors must be submitted if the contractor wants such amount(s) counted towards the evidentiary presumption.**

SECTION V--SUBSTITUTION OF CONTRACTORS

- A. No substitution of any first tier subcontractor including MBE/WBE subcontractors, whose work exceeds 1/2 of one percent (1%) of the total bid amount shall be made

without approval by the City Council or its designee. No substitution of any other MBE/WBE subcontractor, supplier or trucker shall be made without approval by the City Manager or his/her designee.

- B. The term subcontractors, unless specified otherwise, shall include all first tier subcontractors regardless of the percentage of work to be performed; the term subcontractors shall also include MBE/WBE second tier subcontractors.
- C. If an MBE/WBE subcontractor, supplier or trucker is to be substituted or replaced, the contractor shall show good cause for the removal.
- D. Prime contractors awarded any contract based on demonstration that there has been no discrimination or preferential treatment must continue to make outreach efforts to substitute an MBE/WBE subcontractor, supplier or trucker with another MBE/WBE subcontractor. Other City and State regulations regarding subcontractor substitution or addition also apply.

SECTION VI--CONFLICT WITH APPLICABLE FEDERAL OR STATE LAW

In the event that a particular City public works contract is funded or required to be approved in whole or in part by the State or Federal government and any provision contained herein is inconsistent with any applicable state or federal statutes, rules or regulations, orders or controlling policies pertaining to such funding or approval, to the extent that any such provision is inconsistent, it shall not apply to the contract. To the extent a federal project requires an MBE/WBE program, the program set forth in Resolution # _____, rather than this nondiscrimination/nonpreferential treatment program, shall be applicable.

SECTION VII--VIOLATION OF SECTION, DEBARMENT

Any Prime Contractor who discriminates or gives preferences is in violation of Chapter 4.08. In addition, any such violation or any violation of the Substitution of Subcontractors Section or any Prime Contractor who falsifies information or documentation submitted pursuant to these provisions is in breach of contract and is subject to remedies for such breach and, in addition to all other remedies set forth in the Municipal Code, is further subject to the provisions of the San Jose Municipal Code, Chapter 14.04 of Title 14, Part 4, Debarment of Contractors.