

Memorandum

TO: COMMUNITY AND ECONOMIC
DEVELOPMENT COMMITTEE

FROM: Matt Cano

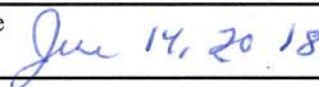
**SUBJECT: COUNCIL PRIORITY #5:
DISADVANTAGED
BUSINESS ENTERPRISE
PROGRAM UPDATE**

DATE: June 11, 2018

Approved



Date



RECOMMENDATION

- a) Accept this staff report which describes the research, analysis, and outreach performed by Keen Independent Research and Silvy Group on a Citywide Contracting Program;
- b) Accept and provide feedback on staff's recommended next steps to continue implementation of the Citywide Contracting program, including outreach and engagement.

OUTCOME

Approval of the recommendation will support of continued progress on the development of a Citywide Contracting Program.

BACKGROUND

At the June 23, 2015, City Council Priority Setting Session, Mayor Liccardo and Councilmembers Kalra, Peralez and Matthews, recommendation (Council Agenda 3/24/15, Item 6.1) to return to the Community and Economic Development Committee (CEDC) with a strategy to implement a Disadvantaged Business Enterprise (DBE) Program throughout the City organization was ranked Council's tenth highest priority. At the December 15, 2015, Council Priority Setting Session, the item was renumbered to the Council's fourteenth highest priority. At the March 7, 2017, Council Priority Setting Session, it was renumbered to the Council's fifth highest priority.

The Public Works Department released a Request for Qualifications (RFQ) on March 4, 2016, to seek qualified firms to assist the City in two service areas related to inclusive contracting and outreach: (1) assistance with outreach to contractors, consultants, and vendors to encourage and

coordinate participation with City construction and consultant contracts; and (2) provide research and recommendations to develop an inclusive race and gender-neutral contracting program to encourage greater availability, capacity, development, and competition on City contracts.

Public Works staff presented a progress report on the topic at the June 27, 2016, CED Committee meeting. The report provided an overview of the legal issues and history and recommended next steps. The link to the progress report can be found at http://sanjose.granicus.com/Viewer.php?meta_id=582016. The Committee approved the approach to develop a Citywide contracting program that is race and gender-neutral.

At the May 23, 2017, City Council meeting (Item 2.16), Council approved Master Agreements with Silvy Group, and Keen Independent Research LLC, and Milagro Marketing LCC, a Joint Venture, for consulting services for the Citywide Contracting Program.

This document provides information gathered, analyzed, and reported by the consultants on the City of San Jose's ability to expand opportunities for diverse businesses in its contracting. The consultants identified barriers by reviewing current practices and constraints, and examining the external business environments. Through the review process, the consultants were able to find short-term opportunities to increase small and local participation in City contracting and develop a list of potential programs the City can pursue long term. Some of these potential programs may require further legal review, charter changes, and resources to implement and administer.

ANALYSIS

Upon execution of the Master Agreements with Keen Independent Research LLC and Milagro Marketing, a Joint Venture, and Silvy Group, the consultants were tasked to assess the City environment by the following:

- Identify current practices, constraints and opportunities concerning the City of San José's procurement and small business inclusion;
- Perform a preliminary scan of the external business environment in which the City operates;
- Synthesize and report results; and
- Develop recommendations for direction in Phase 2.

The analysis was provided by Keen Independent Research in a summary report titled "2018 City of San Jose Small Business Opportunity and Inclusion Project Summary Report- Service Order #2" (attachment A) and "Inclusion Project Summary Report Silvy Group Addendum" (attachment B). Keen Independent and Silvy Group each met with City staff from numerous departments, including Public Works, Finance/Purchasing, City Attorney's Office, Airport, Office of Economic Development, and others. The consultants performed outreach to key stakeholders, including the ethnic and business chambers, contractors' associations, and a mail

survey. Furthermore, the consultants analyzed the City's procurement processes and outreach methods.

Internal Environment

The consultants gathered information from City staff on current conditions regarding the City Charter, major and minor public works contracting, procurement delivery through Finance/Purchasing, local and small business preference programs, the Federal Disadvantaged Business Enterprise Program and the Airport Concession Disadvantaged Business Enterprise Program.

In Appendix C of the summary report, the consultants discuss current conditions and make the following key findings.

- The City Charter requires the City to procure public works contracts that are over \$100,000 via public bidding and to award such contracts to the lowest responsible bidder. Importantly, changing the procurement requirements or the dollar threshold for these types of contracts – known as Major Public Works Contracts – would require a Charter amendment. As a benchmark, the consultants used San Francisco's and noted that that City's threshold for requiring formal bidding is \$600,000.
- The City Charter does not govern the procurement of public works contracts of \$100,000 and below, which are known as Minor Public Works Contracts. The procurement of Minor Public Works Contracts is governed by the San José Municipal Code, which authorizes the Director of Public Works to "solicit informal bids" from at least three "responsible" contractors and to award the contract to the lowest bidder. Importantly, the manner of procuring a Minor Public Works Contract can be modified by ordinance.
- Up until November of 2000, the procurement requirements for supplies, materials and equipment were set forth in the City Charter. In November, 2000, the City Charter was amended to remove these requirements. Now, the procurement of supplies, materials and equipment – along with the procurement of services – is set forth in the San José Municipal Code. Accordingly, these procurement requirements can be changed by ordinance. For clarity, this memorandum will refer to contracts for supplies, materials, equipment, and services as Non-Public Works Contracts.
- The City has a Local and Small Business preference program, which is set forth in the San José Municipal Code. The current program applies only to Non-Public Works Contracts. It does not apply to Major or Minor Public Works Contracts.
- Definition of "Small" business set forth in the San José Municipal Code is one having 35 or fewer employees.

Small Business Support Strategy

Listening to and maintaining communication with the small business community is a critical component to the City's small business strategy. City staff employs a variety of methods including formal research, focus groups, community meetings and events, as well as one-on-one conversations to make sure that service offerings are of value and are changing to address current needs. Such work has resulted in a much better understanding of small business needs including the issues faced by immigrant business owners.

Collaboration with other organizations is also a key component to effectively getting small business feedback. The Silicon Valley organization (SVO), various chambers of commerce, and other members of a collaborative of business assistance organizations called BusinessOwnerSpace.com exchange information with the City as well among themselves. This cross-communication helps the City and its partners identify ways to better serve the small business community.

There is an extensive menu of programs and services provided by the City and its partners that serve, facilitate, and support tens of thousands of small businesses. Highlighted below are a few that are particularly helpful to vendors and contractors interested in doing business with the City.

- BusinessOwnerSpace.com – a City-led network of nearly 30 service partners that provide business planning, marketing, e-commerce, and information technology support, hiring, procurement assistance, and tax preparation assistance at little to no cost to small businesses.
- Small Business Basics Workshops – Staff from the City, work2future, Silicon Valley Small Business Development Center, and other BusinessOwnerSpace.com partners offer a series of workshops targeted to entrepreneurs and small business owners. The workshops are entitled “Doing Business in San Jose” and topics include: Getting Through the Start-up Phase, Planning and Permitting, Business Tax Certificates, Securing Business Loans, Scaling Up to Meet New Demand, Increasing Sales Among Other Topics Suggested by Small Businesses. These Workshops are being conducted at various community centers throughout San José and staff are available to address questions in English, Spanish, and Vietnamese.
- Small Business Contracting and Procurement Opportunities – The City is focused on many efforts to increase small business participation and awareness of future contracting work and opportunities. The City continues to encourage small business participation. For Non-Public Works Contracts, the Finance Department's Purchasing Division has eliminated minimum qualification requirements to submit a bid that may be unnecessarily restrictive for small business; eliminated bid and performance bond requirements *unless required by law*; and, when feasible, is breaking larger purchases into smaller bid packages.

Public Works has more flexibility in procuring Minor Public Works Contracts (under \$100,000) because such contracts are not subject to the City Charter's formal bidding requirements. Public Works has utilized this flexibility to improve and expand outreach and increase opportunities for small businesses to participate, including eliminating bid bond requirements and not requiring performance bonds for contracts under \$25,000. It should be noted that State law requires payment bonds for public works contracts that are over \$25,000. The local/small business preferences discussed above could be applied to Minor Public Works Contracts, although doing so would require an ordinance amending the procurement requirements for such contracts.

External Environment

The Silvy Group was tasked with scanning the external business environment in which the City Operates. The Silvy Group interviewed key external stakeholders, including but not limited to the following:

- Silicon Valley Organization
- Hispanic Chamber of Commerce of Silicon Valley
- Black Chamber of Commerce of Silicon Valley
- Associated General Contractors
- National Association of Women on Construction

To identify perceived barriers and/or challenges to working with a public agency, the Silvy Group attempted to survey the local small business community through an on-line survey. Silvy Group requested the assistance of the above-mentioned organizations, other agencies and through the City Council's public outreach media. Additionally, Silvy Group identified certified Disadvantaged Business Enterprises located in Santa Clara County using the California Unified Certification Program database and Small Business Enterprises through the State's Department of General Services and the City's internal database.

The on-line survey was not as informative as expected. There were 102 respondents, but only 13 were local small businesses and just six of those would be considered "small" under the City's definition. The lack of response from the on-line survey reflects some of the difficulty the City has reaching local small businesses within the community.

Furthermore, the consultants also identified limited knowledge of City contracting and procurement processes among many of the local chamber and other trade associations. This reduces their ability to assist their members in accessing City procurement opportunities since they are not aware of the breadth of opportunities.

Legal Constraints

There are many potential legal constraints that might impact the City's ability to enact programs for expanding the diversity of businesses participating in the City's procurement process. However, a fundamental legal constraint underlying any discussion of the various possible

programs for increasing the diversity of businesses involved in the City's procurement process is that the program be both gender and race neutral.

The gender and race-neutral requirement arises from two primary sources. One source is the equal protection clause of the Federal and State constitutions. In general, the equal protection clause means the government must treat an individual in the same manner as other persons in similar conditions and circumstances. It requires the government to govern impartially, without drawing distinctions between similarly situated individuals without an appropriate level of justification. The justification required for treating an individual differently based on race and gender is extraordinarily difficult to meet.

The second source of the gender and race-neutral requirement is Article 1 Section 31 of the California Constitution, enacted by Proposition 209 in November 1996. Article 1 Section 31 expressly prohibits the government from discriminating against, *or granting preferential treatment to*, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Proposition 209, and the Federal and State constitution do not prohibit the City from tracking and reporting on race, ethnicity, and gender of City contractors and vendors, so long as the data is not used for discriminatory or preferential purposes. The City also must not disseminate collected information in a discriminatory or preferential manner to private groups. In an effort to gain valuable information on the make-up of City contractors and vendors, staff is developing guidelines and procedures to collect demographic information on City procurements.

Potential Programs

The consultants were tasked with identifying potential program options for the City of San José, including avenues for short-term improvements in the City's current procurement practices within the legal constraints outlined above. Extensive research of the City Charter, similar programs implemented by other agencies, and historic legal issues permitted the consultants to develop a list of short-term improvements and a list of potential programs.

In coordination with the consultants, staff has developed a 2-phase, concurrent approach to develop a program to attract local and small businesses to participate in contracting with the City. Phase 1 has been developed and implemented by the Silvy Group. Phase 2 will be developed by Keen Independent Research.

Phase 1: Build Network and Educate

As found in the scan of the external environment, the City currently has limited networking ability to connect with the contracting community at large and opportunities have been lost. Phase 1 is focused on network events to improve dialogue with the construction community, while providing education through workshops and on-line tutorials. Phase 1 includes, but not limited to, the following:

- Explore community networking efforts for contractors and other businesses that have proven effective in other communities; partnerships with other local groups and agencies with ties to individual groups;
- Supplement the pre-bid and pre-proposal conferences, by consider separate meet-and-greet events for prime contractors, subcontractors, and suppliers on large construction projects or plans for a series of contracts;
- Increase the City's overall outreach, by directly reach out to local businesses subject to the San José Business Tax to encourage those companies to register on Bidsync or other procurement system;
- Expand community engagement through educations programs consisting of workshops, courses, and on-line tutorials.

Phase 1 is a crucial step in development of a Citywide Contracting Program. Building the network with prime contractors, subcontractors, supplies, local groups, and agencies and receiving stakeholder feedback will allow the City to develop a program that meets the needs of the community. The following steps and status are below:

Step 1	Social Media Program	In progress (Est. Launch Oct 2018)
Step 2	Opportunity Awareness Events & Workshops Scheduling and Coordination	November 2018
Step 3	Collateral Material & Supporting Documentation	November 2018
Step 4	Mass Mailing and Marketing Launch	December 2018
Step 5	Events	January 2019

Development and use of a Social Media Program will provide contractors and vendors the ability to gain access to information about City procurement and opportunities immediately upon development. For instance, online tutorials about registering for Bidsync and requirements for bidding would be made available through YouTube, allowing contractors and vendors to view multiple times and at their convenience. Increasing awareness on current procurement practices and opportunities allows staff to expand the City's networking for the workshops performed in Step 5 and for any programs established during Phase 2.

Additionally, as one component of its outreach program, Public Works has entered into grant agreements with the Hispanic Chamber of Commerce Silicon Valley and the Black Chamber of Commerce Silicon Valley in an effort to build capacity for contractors and vendors. These grant agreements focus on workshops, one-on-one consultations, and event sponsorships.

Phase 2: Expand Contract Opportunities

The consultants explored ways the City might expand opportunities for small and underutilized businesses to perform locally funded Non-Construction, Major and Minor Public Works Construction contracts and subcontracts. The identified programs may require further legal review, charter changes, and additional staffing resources to implement and administer. For

example, incorporating program requirements on procurement of Non-Construction Contracts and Minor Public Works Contracts would require adoption of ordinances, whereas incorporating program requirements on procurement procedures for Major Public Works Contracts would require a City Charter amendment. Below are programs identified by the consultants that staff will evaluate:

- Implement a Small Business Enterprise (SBE) contract participation goal setting for all contract procurements;
- Extend the Local and Small Business Preference Program Major and Minor Public Works construction;
- Implement an Economically Disadvantaged Business Program;
- Create Goals/Good Faith Effort program aimed at Minority business enterprise (MBE must be certified), Women business enterprises (WBE must be certified), and Other business enterprises (OBE does not require certification) similar to the City of Los Angeles;
- Establish Sheltered Program for SBEs on small purchases. Sheltered programs typically designate certain projects in certain price ranges to be bid by program participants. Applies to contracts for purchases of supplies and equipment;
- Create a Working Capital Program to assist contractors meet the bonding requirements;
- Expand the existing Local and Small Business Preference Program to Major and Minor Public Works Contracts.

The consultants will analyze each program, focusing on the differences and similarities of each program to determine the feasibility and the expected return. The final program may be a standalone program or a combination of multiple programs. Substantial analysis is required for program recommendations. Staff is simultaneously analyzing each program and implementing feasible components into our program over the next several months. Staff intends to bring forward program updates and recommendations developed during Phase 2 to CEDC in March 2019.

Next Steps

As detailed in the summary report, the City would benefit from short-term improvements in the procurement process, staff has identified opportunities to increase participation in City contracting from underrepresented groups, including but not limited to local and small businesses.

Minor Public Works Threshold Increase

At the April 3, 2018 Council Meeting, the City Manager was directed to return to Council with a Staff report discussing the advantages and drawbacks of the "lowest responsible bidder" provisions of the City Charter, at a date prior to the Council's consideration of a ballot measure. At the June 26, 2018 City Council meeting, Public Works will bring forward a discussion that

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includes a possible increase to the threshold for Minor Public Works Contracts (not required to be procured through a formal bidding process) from \$100,000 to \$600,000. This change would allow the City to expand the local and small business preference program, and allow staff greater flexibility to increase the participation of underrepresented businesses.

Outreach Program

As mentioned in the prior section, the City already begun the process to implement this program and the community engagement plan, with the following steps;

1. Phase 1: Build Network and Educate - Develop and implement immediate outreach and engagement action plan, launching in October 2018;
2. Phase 2: Expand Contract Opportunities - Analyze each program provided in the summary report for feasibility, legal considerations, staffing, and resource considerations. This work is underway;
3. Provide progress reports to Community and Economic Development Committee on effectiveness of outreach and the engagement action plan and status of program analysis (January 2019).

COORDINATION

This memo has been coordinated with the Office of Economic Development and the City Attorney's Office.

/s/

MATT CANO

Director of Public Works

For questions, please contact Christopher Hickey, Division Manager, Public Works Department at (408) 535-8481.

Attachments:

A - 2018 Small Business Opportunity and Inclusion Project Summary Report

B - Inclusion Project Summary Report Silvy Group Addendum