



Memorandum

**TO: RULES AND OPEN
GOVERNMENT COMMITTEE**

FROM: Vice Mayor Chappie
Jones
Councilwoman Sylvia
Arenas

**SUBJECT: PROCUREMENT PROGRAMS
FOR MINORITY-OWNED
AND OTHER BUSINESSES**

DATE: December 3, 2020

APPROVED:

DATE: December 3, 2020

RECOMMENDATION

Direct Administration to:

1. Present to Council at the December 15, 2020 Council Meeting the Report on Small/Local Business Contract Participation in FY 2019-20 as accepted by the Community & Economic Development (CED) Committee on November 23, 2020.
2. Accept Recommendations outlined in the letter submitted to the CED Committee from the San Jose Small Business Advisory Task Force and integrate into the workplan.
3. Explore options for implementing a Disparity Study to evaluate and potentially determine the need for new procurement policies that facilitate participation of Minority, Women, and Other owned Business Enterprises (MWOBE) as appropriate.
4. Return to Council in Spring 2021 with proposal, cost estimate, and scope of study to be considered in the annual budget process.

DISCUSSION

In light of the failure of Proposition 16 in the November 2020 Election, which would have given the green light for state and local governments to collect crucial data on public employment practices and expand procurement opportunities for minority owned businesses, it is imperative the City continues to evaluate alternative strategies to ensure the employment of underrepresented community members and the participation of small and disadvantaged businesses in contract opportunities with the City.

In the past, the City of San José had programs that addressed employment inequality. Past programs encouraged and created an avenue for minority and women owned business enterprises (MWBEs) to bid for City contracts. First established in 1983, San José's MWBE program applied to construction contracts over \$50,000. It included participation goals of 5 percent and good faith outreach to at least four MWBE firms in each trade and was designed based on the findings of the

City's 1990 disparity study. San José's MWBE program continued beyond Proposition 209 until 2000, when the California Supreme Court struck down this inclusionary effort in *Hi-Voltage Wire Works, Inc. v. City of San José*. This created new barriers and discouraged minority and women-owned businesses from competing for contracts, which negatively impacted small business creation, expansion, and survival. Unfortunately, these barriers established a precedent statewide. [According to a 2015 study commissioned by the Equal Justice Society](#), since the passage of Proposition 209, state and local governments (e.g. State of California, Cities of Oakland, San Diego, City/County of San Francisco) ended their disadvantaged contracting programs, resulting in a loss of \$1 billion to \$1.1 billion annually for MWBEs. For the City of San José, it is estimated that a loss of \$20 million occurs every year for MWBEs.

Today, the City of San José, has programs for disadvantaged and local business enterprises, which includes local and small business preference on minor construction contracts, the Public Works Construction Academy, and a Minor Contract Prequalification Program. Thanks to Staff's commendable effort, these programs were carefully created to enhance education and help reduce barriers to participate in procurement opportunities with the City. As noted in the [Local/Small Business Contracting Participation Update for Fiscal Year 2019-2020 \(Staff Report\)](#), these programs began in 2019 and have contributed to a steady trajectory of contracts and dollars awarded to small and local businesses, which is in contrast to the report of FY 2018-19 that noted a five-year low.

Considering the tremendous impact that COVID-19 has had on small and local businesses, and as suggested by the [Small Business Advisory Task Force](#) in their attached letter, the City must continue to do more to ensure and reinstate equitable opportunities. Included in their list of recommendations is a coordinated effort across departments to break-up contracts into smaller minor public works contracts, thus increasing opportunities and dollars awarded to our disadvantaged businesses. This recommendation is based on the finding noted in Staff's Report that the City awarded contracts to local and local/small contractors more frequently under minor contracts. Please note that any policy change that emerges should align with existing city ordinances or agreements, e.g, prevailing wage, wage theft, project labor agreements, etc., and should not circumvent legal requirements or contractual agreements.

Also noted in the Staff Report, Public Works started obtaining additional CIP participation data, such as Women-owned Business Enterprise (WBE), Minority-owned Business Enterprise (MBE), Disadvantaged Business Enterprise (DBE), Lesbian, Gay, Bisexual, and Transgender Business Enterprise (LGBTBE) and Veteran Owned Small Business (VOSB). Due to legal constraints, the City is not able to make any specific procurement decisions based on the information. We recommend for the Administration, through coordination between the City Manager's Office and the City Attorney's Office, to further research this legal constraint and consider implementing a disparity study, which could potentially demonstrate the need for additional procurement policies, based on race, ethnicity, gender, etc, and further establish and officiate procedures for the collection and use of information, and further remove barriers for participation.

The U.S. Supreme Court 1989 decision in *City of Richmond v J.A. Croson Co.* ruled against the City of Richmond, Virginia's ability to evaluate its MBE contracting goals according to the percentage of minority population in the city. However, it upheld the right of the City of Richmond and all public entities to have race-conscious procurement programs based on availability as shown in disparity studies. This ruling may serve as the legal decision that can guide MWBE policies today. The City of Los Angeles is the only jurisdiction in the State of

California that reformulated its MWBE program into a race-neutral Minority, Women, and *Other* Business Enterprise (MWOBE) program after the 1989 Croson decision. The MWOBE program became a modified SBE program which continues to include outreach and voluntary sub-contracting with MBEs, WBEs, and OBEs. In fact, the [City of San Diego](#) is currently implementing a disparity study and may serve as a model and provide recommendations for consideration.

We are proud of our City and its leadership for demonstrating its steadfast commitment to ensuring equity for its residents through adoption of the Black Live Matter Resolution, endorsement of Propositions 16 and [17](#), and establishment of the Office of Racial Equity. Whether it is through this newly created Office or through the Department of Public Works, it is imperative that the City continues to demonstrate commitment to our small businesses to ensure that disadvantaged groups are receiving equitable opportunities to thrive as they continue to contribute to the vibrancy of our City and community.

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member's staff.



November 20, 2020

Community & Economic Development Committee
City of San Jose
200 E Santa Clara Street
San Jose, CA 95113

SUBJECT: Agenda Item 6. Local/Small Business Contracting Participation Update for Fiscal Year 2019-2020.

Dear Members of the Community & Economic Development Committee,

On behalf of the Small Business Advisory Task Force (SBATF), which is facilitated by the Council District 1 Office and made up of leaders of local chambers of commerce and business associations, we commend and support the work of various City Departments in the concerted effort to increase contract opportunities for small and local businesses with the City of San Jose. The SBATF has been instrumental in providing feedback to the Public Works Department and others on programs and policies that impact small businesses and greatly appreciates their collaboration and consideration. In reviewing the report on Contracting with Local and Small Businesses in FY 2019-20, I write to you in strong support of the City's steady trajectory of contracts and dollars awarded to small and local businesses, and to suggest some additional efforts for consideration in order to continue and improve that trajectory.

First, we commend the Finance Department Purchasing Division and their workplan to continue expanding outreach efforts to increase small and local business participation. Second, we commend the Public Works Department for their continued efforts and progress on the development and implementation of the Minor Public Works Contract Prequalification Program, the Public Works Academy, and policy changes across departments aimed at improving education and outreach to address the challenges that small and local businesses face when attempting to do business with the City.

Considering the tremendous impact that COVID-19 has had on small and local businesses particularly, the City must continue to do more. It is a relief to see that the dollars and number of contracts awarded to small businesses has either remained steady or has increased when compared to the previous fiscal year. However, to continue and increase that trajectory, a targeted effort towards benchmarking, data collection, identification of effective strategies, and adoption of a goal or threshold for which the City can work towards are recommended in order to accomplish more impactful and enduring results. As stated in the report, "with a five-year CIP valued at nearly \$4 billion, the City must be proactive to ensure that we are 'Building our City with our Community' by providing opportunities for our small and local businesses."

1. Data Collection & Evaluation of Effective Strategies

Staff notes the need to continue to collect data and track local/small business participation. This information is crucial in identifying what strategies are working and how they can be modified for more impactful results. In addition to tracking local/small business participation, Public Works also started obtaining additional CIP participation data such as Women-owned Business Enterprise (WBE), Minority-owned Business Enterprise (MBE), Disadvantaged Business Enterprise (DBE), Lesbian, Gay, Bisexual, and Transgender Business Enterprise (LGBTBE) and Veteran Owned Small Business (VOSB). Due to legal constraints, the City is not able to make any specific procurement decisions based on the information. I recommend for the Administration to further research this legal constraint, and how the City can create more preferences, in addition to small and local, to increase minority owned business participation. It is understood that if the City were to implement a disparity study, this could potentially provide support indicating the need for preferences based on race, ethnicity, gender, sexual orientation, etc.

2. Break-Down of Major Contracts to Minor Contracts

As mentioned, FY 2019-20 is the first fiscal year that the CIP has reported on minor public works contracts. During this fiscal period, the City awarded contracts to local and local/small contractors more frequently under minor contracts. “The higher award percentages on minor contracts is not surprising as most smaller contractors do not have the financial capacity to hold the larger contracts and therefore their bid participation is higher on minor contracts.” As a result of this analysis, I request that the administration consider a coordinated effort across departments to break-up contracts into smaller and minor public works contracts, thus increasing opportunities for local and local/small contractors to participate in bids and work with the City.

3. Promote or Create a Matchmaking/Mentorship Program for Small and Underrepresented Businesses

To address the low award percentages on minor contracts, develop a Matchmaking Program in which small businesses can meet and establish relationships with prime contractors and representatives of the City; at the same time, businesses can answer questions that could serve as a screening or qualification for a Mentorship Program that could lead to doing business with the City. A proactive matchmaking program could serve as a complement to the proposed consideration of Minority-owned Business Enterprise (MBE), Women-owned Business Enterprise (WBE), and Other Business Enterprise (OBE) contract goals.

4. Benchmarking – How Do We Compare with Other Cities? What is the City’s Goal?

As noted in the report, administration will continue to track various data points in order to establish benchmarking measures. Over the last five fiscal years, the report notes fluctuation in total number of major construction dollars and contracts and portions awarded for local and local/small businesses. The City’s goal is to increase percentage of contracts and dollars awarded in the local and small business categories year over year. This goal makes sense when

awarded contracts and dollars are rather low as demonstrated in previous years, especially in FY 2018-19. The next step should include learning about how we compare to other cities, such as Oakland, San Francisco, San Diego and others as appropriate so that we can understand what goal or threshold we should adopt and strive to achieve. Now more than ever when small businesses are struggling to survive in the midst of the current pandemic, the City should do its best to ensure longstanding opportunities.

Thank you for your consideration. We commend the Committee's and Council's direction and prioritization of disadvantaged businesses and local/small contracting participation. We appreciate staff's hard work and implementation of effective policy and programs established to improve local/small business contracting participation, and we look forward to continuing to work with City Administration to further develop opportunities for small business growth.

Sincerely,

Dennis King

Dennis King

Vice Chair, Small Business Advisory Task Force

Executive Director, Hispanic Chamber of Commerce

Members of the San Jose Small Business Task Force:

Vice Mayor Chappie Jones

Hispanic Chamber of Commerce

FilAm Chamber of Commerce Silicon Valley

Rainbow Chamber of Commerce

Silicon Valley Black Chamber of Commerce

Silicon Valley Chinese Technology & Business Association

The Silicon Valley Organization

Winchester Business Association

Taiwanese American Chamber of Commerce

Vietnamese American Chamber of Commerce

Vietnamese American Chamber of Commerce of Northern California