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DEPARTMENT OF
GENERAL SERVICES

CITY OF SACRAMENTO
CALIFORNIA

5730 - 24TH STREET
BUILDING FOUR
SACRAMENTO, CA
95822-3699

MINORITY AND WOMEN
BUSINESS ENTERPRISE PROGRAM

September 8, 1989
MWBE90:016

916-449-8505

Budget and Finance Committee
Transportation and Community Development Committee
Sacramento, California

Honorable Members in Session:

SUBJECT: Proposed Strategy in response to the U.S. Supreme Court
Decision in City of Richmond v. J.A. Croson Co.

SUMMARY

The attached report offers a proposed strategy for making revisions to the City's Minority/Women Business Enterprise (M/WBE) Program in light of the U.S. Supreme Court decision in the case of the City of Richmond v. J.A. Croson Co.

RECOMMENDATION

It is requested that the Joint Committees review this report and recommend adoption by the full Council of the attached Resolution to implement the proposed revisions to the City's M/WBE Program.

Respectfully submitted,

ROBBIN DESHIELDS RANDOLPH
Purchasing Manager/
M/WBE Program Manager

Approved:

SOLON WISHAM, JR.
Assistant City Manager

All Districts
September 19, 1989



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SUBJECT: Proposed Strategy in Response to the U.S. Supreme Court
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SUMMARY

This report recommends that the Council adopt a multi-element approach in response to the effects of the U.S. Supreme Court decision in the case of City of Richmond v. J.A. Croson Co. on the City's Minority/Women Business Enterprise (M/WBE) Program. The elements being proposed are:

I. Undertake a Study to Provide a Factual Predicate for a Minority/Women Business Enterprise Program.

Explore the possibility of funding a study (preferably on a joint-venture basis with the County of Sacramento and the Sacramento Housing and Redevelopment Agency) to develop the factual basis required by the Supreme Court decision for establishment of racially preferential programs.

II. Continue M/WBE Goals and Outreach Efforts.

The City's goals of 20% (MBE) and 5% (WBE) will remain in effect until the factual predicate study is completed, at which time they will be modified, if necessary, according to the results of the study.

Staff will continue to monitor and report expenditures with M/WBE firms as has been done for the past fiscal year.

It will continue to be the policy of the City to encourage increased diversity in the City's vendor base.

III. Establish a Small Business Economic Opportunity Program.

Develop a racially-neutral Small Business Economic Opportunity Program that would provide assistance to City-certified small businesses doing business with the City.

BACKGROUND

Since 1985 the City's Minority and Women Business Enterprise (M/WBE) Program has been actively working to increase the participation of minority and women owned businesses in City business transactions. Originally an element of the Office of Economic Development, the M/WBE Program was moved in July 1988 to be administered by the City Manager's Office through the Department of General Services. With this move, the program was intensified and pursued more aggressively.

In January 1989 the U.S. Supreme Court rendered a decision in City of Richmond v. J.A. Croson Co. which will require that major changes be made in the M/WBE Program. In its ruling the Court imposed stringent new restrictions on the use of race-based preferences by state and local governments. In order to use a racial preference, a state or local government must specifically document past discriminatory acts by clearly identified parties. Any remedial actions must then be "narrowly tailored" to the specific victims of the discrimination. Racial preferences cannot be used to compensate for societal discrimination.

The City Attorney's Office recommends that Sacramento's M/WBE Program as currently structured be adjusted to ensure compliance with the Supreme Court's new guidelines. This report will recommend changes to the structure and function of the Program in order to achieve the policy intent of the Council while conforming to the law as a result of the Supreme Court decision.

ANALYSIS

I. UNDERTAKE A STUDY TO PROVIDE A FACTUAL PREDICATE FOR A MINORITY/WOMEN BUSINESS ENTERPRISE PROGRAM.

In its decision in the case of City of Richmond v. J.A. Croson Co. (hereafter referred to as Croson), the Supreme Court stated that racially-preferential programs would be appropriate only if a factual basis could be drawn demonstrating the necessity of such a program to remedy past discrimination.

Municipalities across the nation have begun to construct the data necessary to substantiate their M/WBE programs.

Typically, the studies required to establish the factual basis for M/WBE programs have cost in the range of about \$50,000 to \$100,000,

depending on market area and accessibility of required data. Because of the stringent requirements imposed by the Court, the construction of such data typically requires that detailed studies be undertaken relating to the business demographic distribution within the jurisdiction's market area. All of the information must be categorized by industry type and broken down to show ethnicity of participants within the industries. Also required is the gathering of available evidence of past discrimination in the award of contracts within the identified markets. In addition to the studies and statistical reports, hearings are usually held to provide the opportunity for public presentation of both factual and anecdotal evidence of past discriminatory practices. Many jurisdictions are in the process of selecting consulting firms to perform the studies and hold needed hearings.

It is proposed that the City of Sacramento negotiate a joint venture with the County of Sacramento and the Sacramento Housing and Redevelopment Agency (SHRA) to develop a Request for Proposal (RFP) for selection of a consultant to gather the information needed to determine the basis for an M/WBE program.

II. CONTINUE M/WBE GOALS AND OUTREACH EFFORTS

Specific M/WBE goals have been in place in the City since April 1985, when the Council adopted a Resolution (85-328) calling for 10% (DBE) and 1% (WBE) goals. In August 1988 Resolution 88-738 formally established goals of 20% (MBE) and 5% (WBE) for discretionary City purchases, and in January 1989 the same overall goals were established by Resolution 89-056 for the Capital Improvement Budget (to be applied project-by-project). It was only 12 days after this most recent Resolution was passed that the U.S. Supreme Court handed down its Crosby decision.

The City's goals do not constitute the setting aside of particular contracts or procurements for exclusive award to M/WBE firms, but rather the goals reflect the desire of the Council to see a substantial increase in the amount of business being done with M/WBE firms. For perspective, the background report supporting the original adoption of the 20% and 5% goals (in August 1988) suggested that they should be achieved over a five year period. For the fiscal year ended June 30, 1989, M/WBE utilization in Operating Budget discretionary expenditures stood at 7.4%.

III. ESTABLISH A SMALL BUSINESS ECONOMIC OPPORTUNITY PROGRAM

A. OVERVIEW

Competition and expansion of economic opportunities are good business for the City. Participation of small, minority-owned, and

woman-owned businesses in all areas of economic activity contributes to a competitive environment and broadens the economic base of the City. An increase in the level of competition may tend to lower prices paid by the City for goods and services, and the expanded business base will help to solidify the economic foundation in Sacramento. Part of the City's overall economic development strategy is to increase the level of participation of small businesses in City construction, procurement, and services contracts. This interest can be facilitated by the development of a Small Business Economic Opportunity Program. Because many minority-owned and woman-owned firms are small businesses, a significant effect of the new program should also be an increase in their participation in City business.

B. PROPOSED PROGRAM FEATURES

The major features of the proposed program are as follows:

1. **Program Name.**

Small Business Economic Opportunity Program.

2. **Eligibility.**

- o Open to participation by majority-owned, minority-owned, male-owned, and female-owned small businesses.
- o Gross business receipts not to exceed pre-determined amounts per year, based on the industry-group and type of business. Industry-groups and business types would be those established by the State of California Department of General Services Office of Small and Minority Business (OSMB). The dollar amounts within those categories would be changed to appropriately reflect the economic conditions of the Sacramento area.

3. **Certification.**

- o A certification process modeled after the State OSMB regulations would be established to ensure participation by firms meeting program eligibility criteria. One difference from the OSMB process, at least initially, would be utilization of a "self-certification" system similar to that currently in use by the M/WBE Program for certification of M/WBE's. Such a system relies upon applicants

providing information about their businesses which they affirm to be correct under penalty of perjury.

- o Substantiation of business income would be required in the form of copies of Federal Income Tax returns or audited financial statements.
- o Certification would be valid for a period of two years, renewable for up to a total of six years, after which a business would no longer be able to participate in the program.

4. Participation Goals.

- o Council would set a goal at beginning of each fiscal year for achieving a level of utilization of City-certified small businesses in overall discretionary City transactions.

5. Tracking/Reporting.

- o Expenditures would be monitored using the computerized Local Government Financial System (LGFS), using substantially the same methods currently employed to track and report expenditures with M/WBE firms.
- o The program would continue tracking/reporting of expenditures with minority-owned and woman-owned businesses.

6. Bid Preferences.

- o It is proposed that City-certified small businesses be afforded a five percent (5%) preference in City bids for commodities and services for which the estimated cost is \$25,000 or less.
- o The intent of bid preferences would be to permit small businesses to obtain contracts of a size and nature that they are likely to perform successfully, but for which they might not be able to compete successfully in the bidding process without the aid of the bid preference.

7. Contract Set-asides.

- o It is proposed that a contract set-aside system be developed to provide greater opportunities for City-certified small businesses to participate in

construction contracts.

- o Certain contracts or portions of contracts would be reserved for City-certified small businesses. Once a contract was identified to be "set aside" for small business, the competitive bidding process would be utilized as is done currently, with the only exception being that in order to participate in the bidding process a business would have to be City-certified as a small business.
- o Contract set-asides would be limited to use with contracts for which the estimated cost does not exceed a specified maximum dollar amount. In addition, a sufficient pool of qualified small businesses would have to be available to ensure a competitive bidding environment.
- o The City Manager or his designee would have the authority to require that a percentage of the contracts administered by individual departments be set aside for certified small businesses.

8. **Bid Solicitation.**

Whenever bids or proposals are solicited, it would be City policy to ensure that businesses qualified for certification under the City's program are included in all solicitations for bids and proposals.

9. **Selection Panels.**

It would be City policy that all selection panels evaluating bids and proposals would adhere to the following guidelines:

- o The race or gender of the bidder shall not be a consideration.
- o Past performance and size of business will be used as a measure of qualification only to the extent that such factors are deemed critical to the success of the project for which the selection is being made.
- o The number of references required from potential contractors should be kept to the minimum necessary to ascertain the abilities of the contractor to perform successfully on the subject project.

- o There should be a diversity of representation on bid and proposal evaluation/selection panels, including participation by minorities and women.

10. **Scope of the Program.**

Would include all City Departments awarding contracts for construction, procurement, and services including professional and other services.

11. **Management/Organizational Structure.**

It is recommended that the basic management and organizational structure currently in place for the M/WBE Program be carried forward for the Small Business Economic Opportunity Program. That structure is as follows:

- o Direct program administration rests with the City Manager. This responsibility would include the issuance of any annual utilization goals, the preparation of quarterly progress reports, and the issuance of an Annual Report covering the activities and accomplishments of the Small Business Economic Opportunity Program.
- o Certification of both small businesses and minority-owned and woman-owned businesses would be carried out in the Department of General Services. In addition, this office would be responsible for outreach efforts and marketing of the program as well as coordination with City staff from all departments. The Procurement Services Division Manager would be designated as the Small Business Economic Opportunity Program Manager, reporting directly to the City Manager's Office for matters relating to this program.
- o The two full-time staff positions currently allocated to the M/WBE Program would be retained under the Small Business Economic Opportunity Program. The Administrative Assistant II (1.0 FTE) would be designated as Program Coordinator, would continue to report directly to the Program Manager, and would be responsible for supervision of the Typist Clerk II (1.0 FTE) position.

FINANCIAL IMPACT

That portion of the General Services' budget currently earmarked for the M/WBE Program would be utilized for the operation of the Small Business Economic Opportunity Program and for coordination of the City efforts in the joint-venture study in response to the Croson decision.

In the short term, there could be some increased costs to the City, to the extent that bid preferences are extended resulting in award of contracts to other than the lowest bidder. The maximum amount of these costs would be 5% of the total value of projects subject to the bid-preference program. Any such costs incurred could be measured over time as the program progresses.

Contract set-asides could result in some increased costs due to the amount of staff time required for administration, monitoring, and tracking. Additional costs could be incurred in the bidding process itself, due to a smaller "universe" of bidders. Any such costs should be minimal and could not be accurately tracked due to the many factors that operate in a competitive bidding environment.

In the longer term, savings may occur as new businesses become viable and begin to compete in the "unprotected" bidding process. To the extent that this occurs, the level of competition may increase, resulting in lower bids to the City. The magnitude of such potential savings is impossible to estimate and will be difficult to track over time due to the fact that the degree of competition in any given market is determined by many external forces on an ongoing basis.

Costs for hiring an outside consultant for studies/hearings related to building a factual predicate for an M/WBE preferential program based on past discrimination will be incurred. Based on the experience of other cities, the total cost of such a study can be expected to be in the \$50,000 to \$100,000 range. If the City, County, and SHRA agree to equally share the cost of such a study, the City's share could then be expected to be in the range of \$15,000 to \$35,000.

Depending on the level of participation in the program, additional staff might be necessary to accomplish certification and monitoring functions. To the extent this should become necessary, the increased staff would be a cost attributable to the program.

CONCLUSION

Because the City finds it to be in the best interests of all of the citizens to have a viable and balanced economy in Sacramento, the Council has made it a policy to ensure that all segments of the economic community are provided an equal opportunity to participate

in City business transactions. It was toward this end that the City established the M/WBE Program. The Supreme Court's Croson decision changed the standards by which such programs could legally operate. Because the City wishes to continue to assist minority-owned businesses, woman-owned businesses, and businesses in their formative stages, a small business assistance program is being proposed. Its intent is to help bring diversity, balance, and vigor not only to the general Sacramento economy, but to City business transactions as well.

RECOMMENDATION

It is recommended that the City Council adopt the attached Resolution which:

1. Changes the Program name from Minority/Women Business Enterprise Program to Small Business Economic Opportunity Program; and
- 2) Reaffirms the City's M/WBE goals; and
- 3) Directs staff to begin negotiations with the County of Sacramento and the Sacramento Housing and Redevelopment Agency for a joint-venture to hire a consultant to conduct a study for the purpose of determining a factual predicate for preferential M/WBE programs within the Agencies; and
- 4) Directs staff to formulate the necessary administrative procedures to establish a Small Business Economic Opportunity Program, and report back to Council on those proposed procedures and a time-line for their implementation.

Respectfully Submitted,



ROBBIN DESHIELDS RANDOLPH
Procurement Services Manager/
M/WBE Program Manager

RECOMMENDATION APPROVED:

WALTER J. SLIPE
City Manager

RESOLUTION NO.

ADOPTED BY THE SACRAMENTO CITY COUNCIL

ON DATE OF _____

CHANGING PROGRAM NAME, REAFFIRMING MINORITY AND WOMEN BUSINESS ENTERPRISE (M/WBE) GOALS, DIRECTING STAFF TO NEGOTIATE A JOINT VENTURE REQUEST FOR PROPOSALS FOR FACTUAL PREDICATE STUDY, AND DIRECTING STAFF TO DEVELOP ADMINISTRATIVE PROCEDURES FOR A SMALL BUSINESS ECONOMIC OPPORTUNITY PROGRAM.

WHEREAS, the City of Sacramento is committed to a viable and balanced economy with equal opportunity for participation by all segments of the economic community; and

WHEREAS, the City of Sacramento has since 1985 had a Minority and Women Business Enterprise Program with a goal of increasing opportunities for minority-owned and woman-owned firms to do business with the City; and

WHEREAS, the City of Sacramento recognizes the need for revisions to its Minority and Women Business Enterprise Program as a result of the U.S. Supreme Court decision in the case of City of Richmond v. J.A. Croson Co.;

NOW, THEREFORE, BE IT RESOLVED, that the City of Sacramento adopts the following resolution that:

1. Changes the program name from Minority/Women Business Enterprise Program to Small Business Economic Opportunity Program.
2. Re-affirms minority and women business enterprise goals of 20% (MBE) and 5% (WBE) for discretionary purchases and contracts made by the City. The target will be that the goals should be achieved in stages of not less than 4% (MBE) and 1% (WBE) increases per year. These goals will remain in place until such time as a study to determine the factual predicate for a preferential M/WBE program is completed. At that time, the goals will be adjusted by the Council in accordance with the results of the study.
3. Authorizes and directs staff to enter into negotiations with the County of Sacramento and the Sacramento Housing and Redevelopment Agency to prepare a joint-venture request for proposal (RFP) for a study to determine the factual predicate for a remedial M/WBE program.

FOR CITY CLERK USE ONLY

RESOLUTION NO.: _____

DATE ADOPTED: _____

4. Directs staff to develop administrative procedures for implementation of a Small Business Economic Opportunity Program and report back to Council with those procedures and a time-line for their implementation.

MAYOR

ATTESTS:

CITY CLERK

FOR CITY CLERK USE ONLY

RESOLUTION NO.: _____

DATE ADOPTED: _____