



DEPARTMENT OF
PUBLIC WORKS

OFFICE OF THE DIRECTOR

CITY OF SACRAMENTO
CALIFORNIA

January 18, 1994

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Law Legislation Committee
Sacramento, CA

Honorable Members in Session

SUBJECT: AFFIRMATIVE ACTION PROGRAM REPORT

LOCATION AND COUNCIL DISTRICT: CITY WIDE

RECOMMENDATION:

This report recommends that the Law and Legislation Committee review and recommend approval of the Affirmative Action Program and forward it to the City Council for adoption.

CONTACT PERSON: GREGORY P. HOVIOUS, CONTRACT OFFICER, 433-6377

FOR COMMITTEE MEETING: January 18, 1994

SUMMARY:

The issues of Affirmative Action, Local Hire, Neighborhood Hire and Local Business Enterprises have been discussed during the MBE / WBE hearings. With the City's MBE / WBE program adopted, staff is prepared to move forward with programs to address other social-economic concerns of Council. This report discusses the merits of the various programs and legal issues likely to be raised.

BACKGROUND:

The current discussion regarding local hiring practices has been brought to the forefront primarily by concerned citizens of our community and their representative City Council members. City staff have been directed by Council to review current practices with the goal of implementing policies and/or procedures to increase employment of local residents on City construction projects as a means to decrease local unemployment and stimulate economic recovery in the City.

Currently the City does not have an expressed local hiring policy. Unlike the hire of minorities, women, veterans and disabled persons there are no expressed local, state, or federal requirements / orders encouraging a local hire practice. In fact, court rulings indicate local hiring requirements are a potential violation of the U.S. Constitution's Privileges and Immunities Clause. This issue is discussed in more detail later in this report.

Given Council's directive and the stated court decisions, staff set out to review and resolve the issues relating to the implementation of a local employment program.

Defining Local

The first and foremost issue is defining "local". Options for defining "local" include:

- Census Tract
- City Council District
- City
- Sacramento Metropolitan Statistical Area
- Neighborhood
- SMUD Service Area
- County
- Redevelopment Area

However, given the fact that this discussion was initiated by the actions of small community groups, "local" as it appears defined by discussions with those community members means "neighborhood" hire.

From staff review, it is apparent that for the most part "neighborhood" hire concerns are interrelated with minority and women employment concerns. When projects are developed in areas with a predominate minority population, yet the project work force does not reflect such ethnic diversity, the community raises concerns that there is no "local" hiring practice. In reality, this problem could arise even if 100% of the work force were local residents if local is defined by City and County boundaries. Therefore, defining local to be broader than an immediate geographic area to the project may not satisfy the concerns of these communities. However, in balance, while addressing specific neighborhood employment opportunities, we can not overlook the greater purpose of economic opportunity or recovery for the entire Sacramento community.

A review of the three most vocal communities with respect to local hire (Del Paso Heights, Meadowview, and Oak Park) shows that two of the three communities are redevelopment areas and all three areas are classified as high density unemployment areas (HDUAs) by the State Department of Commerce under the California Economic Incentives Act of 1984. The recent census data indicates that a greater percentage of minority residents live in these three communities when compared with overall City data. Additionally, the data indicates that 51% or more of the residents of these areas are low income.

As redevelopment and community improvement activities occur within the Del Paso Heights, Oak Park, and Meadowview communities, resident concerns not only focus on removal of physical blight but most critically on economic revitalization for those who live there. In addition to the development and rehabilitation of public facilities and infrastructure which will benefit the neighborhood, community residents desire the jobs created with these projects be targeted for neighborhood residents. This accomplishes two significant goals: physical, social and economic revitalization; and a sense of pride, accomplishment and ownership in one's neighborhood which may foster further revitalization and prevent disregard and debilitation.

Legal / Constitutional Issues

It should be noted as we proceed through the discussion and recommendations on this issue that it is not a simple one to resolve. Any policies or procedures adopted by the Council may be subject to legal challenge or manipulation. Some legal challenges of local hire policies have been litigated to the Supreme Court, utilizing an extensive amount of time and resources. Additionally, policy manipulation¹ can occur unless narrowly tailored programs are implemented to achieve the goals of Council. Therefore, it is essential that policies and procedures be adopted that are succinct enough to minimize outside challenges and manipulations, and maximize / goal attainment.

The legal / constitutional issues related to a local hiring program are significant. In general, the courts have held that a local hiring preference violates the Privileges and Immunities clause of the U.S. Constitution unless it can be shown that the preference is needed to remedy a "peculiar source of evil" caused by non-residents.

The State of Alaska enacted a statute which required the employment of Alaskan residents only on oil and gas pipelines works of which the State was a party. The U.S. Supreme Court in Hicklin v Orbeck, 437 U.S. 518, (1978) overturned this statute because it was found that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking work but rather the fact that a substantial number of Alaska's jobless residents were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities.

¹ An example of policy manipulation, which is appearing more prevalent, is the transfer of the majority (51%) of a business from the non-minority male owner to his wife in order to receive the women enterprise preference.

The City Attorney has indicated that the U.S. Supreme Court's broad language in United Building & Construction Trades v Mayor and Council of the City of Camden, 465 U.S. 208 (1984) (hereinafter Camden) emphasizes local control over expenditure of local funds and considerable state leeway in analyzing local evils and prescribing appropriate cures does leave the door open for justifying a local hiring preference under appropriate circumstances. However, the difficulty exists in demonstrating that local unemployment problems are created by non-residents.

The City of Oakland has, using the Camden standard as a model, made a finding that local unemployment problems are created by non-residents. The Oakland study indicated a high welfare rate, large population of homeless persons, high crime rate, considerable percentage of the population living below the poverty level, an unemployment rate above average and a small percentage of local residents working on public works projects. Based on their findings, the City and Redevelopment Agency of the City of Oakland instituted a local employment program which provides for any construction contract with the City of Oakland the goal of 40% of all work hours at the construction site shall be furnished by City residents on a craft-by-craft basis; and all new hires must be Oakland residents. Prior to final adoption of this policy, the Oakland City Council had adopted an interim hiring program with the goal of 20% of all work hours by City residents on a craft by craft basis and 50% of all new hires.

The Oakland study, while justifying the local hire program, has sent a negative image of Oakland to outside population. When considering whether to replicate the findings of the Oakland project here in Sacramento, staff recommend Council also consider whether such findings of economic troubles in Sacramento would counter the message of economic potential which has become a clear agenda for the Council.

Although the statistical data for Sacramento may possibly support the Council making a finding that the social and economic ills facing Sacramento in part result from high unemployment, the test comes in demonstrating that residents from outside of Sacramento are acquiring the jobs available in our community and thus prove "a peculiar source of evil to residents" which necessitates a local hire program. This is difficult to demonstrate because an estimate by staff indicates that 62% of all employees on local government construction contracts are residents within the Sacramento County border.

According to Sierra Building Trades Association, there is an approximate 32% unemployment rate among skilled trades persons / construction workers in the Sacramento area . It can be argued that new construction jobs should be made available to those workers who are Sacramento residents before non-residents. However, this high unemployment rate is more a function of the recession and a lagging construction industry than non-local residents taking jobs away from local residents.

There are also unemployed local residents who do not possess the requisite skills or experience to fill new construction jobs. When community leaders raise concerns that employment opportunities are denied to individuals because of their ethnicity, gender or social-economic class, those same individuals may have been denied access to the

necessary training, education or experience-making opportunities. In this case there can be the immediate gratification of a job but rather the commitment of all parties, the City, contractors, community/neighborhood leaders, and the individuals for the training and development of skilled and prepared trades persons. This process may take from one to two years or more depending on the educational needs of the individual and skill requirements of the chosen construction field.

In summary, the City, at best, may possibly only meet one of the Supreme Court requirements for upholding a local hiring policy. For the above reasons, staff recommends adoption of the attached Affirmative Action program which follows existing laws, policies and programs to accomplish the same goals as local hire. A more aggressive emphasis on enforcement of employment opportunities for minority and women which follow existing laws could be more expedient and effective. This approach would provide immediate relief to the situation as opposed to adopting policies which may be litigated for years. Although avoidance of litigation is certainly not a reason for avoiding the development of necessary policy, staff believes that programs mandating minority and women hiring can address the concerns of our neighborhoods.

Affirmative Action Program

The attached Affirmative Action Program (AAP) is designed to have major interaction with community based organizations to identify those minority and women individuals who have the necessary skills and background for the project. These individuals are screened and then sent to the contractors who have employment openings. This process accomplishes two goals - involving the community with the project through established groups and assisting the contractors in meeting their Affirmative Action goals by providing a base of minorities and women who are in need of employment. While focusing on local community based organizations, this program is not exclusionary as prohibited by the courts without the requisite findings. The search for minority and women who desire construction careers starts in the community and expands as the qualified applicant pool grows.

The adoption of this program will avoid the necessity of separate Local Hire programs and Neighborhood Hire programs by capturing these issues through the community based outreach efforts. The Office of Equal Opportunity in Construction (OEOC), a part of SHRA, functions as an outreach job-search organization to canvass local communities for qualified and interested construction workers. OEOC works with community based organizations to assist those who need assistance finding construction work. OEOC refers these individuals to the contractor for potential employment opportunities. By so doing, OEOC is able to generate a list of local individuals who may participate in the construction project through apprentice programs and journeyman positions.

The proposed AAP has minority employee goals of 20% and women employee goals of 6.9% on a craft by craft basis. The AAP has 12 requirements, including 15 specific steps, to

be followed by those contractors who are not in compliance with the goals. The AAP also contains penalty provisions for those contractors who fail to comply.

FINANCIAL CONSIDERATIONS:

The City of Sacramento expended \$37,478 with SHRA (OEOC) for Affirmative Action assistance in 1993. The total funding for OEOC was \$124,928 (County of Sacramento \$62,464 and SHRA \$24,986). Negotiations for 1994 are underway. Currently, the 1994 funding request for OEOC is \$170,976. Using the same percentage breakdown, the City's portion would be \$51,292. As negotiations progress, staff will advise Council.

Construction bids will likely increase as well to cover the cost of additional administration for the AAP. Staff costs may also increase. The amount of these additional costs is unknown.

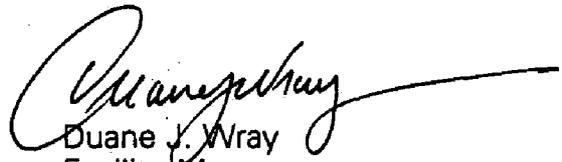
POLICY CONSIDERATIONS:

Adoption of the programs recommended herein are consistent with expressed Council direction and the Sacramento City Code, as well as established State and Federal laws.

MBE / WBE EFFORTS

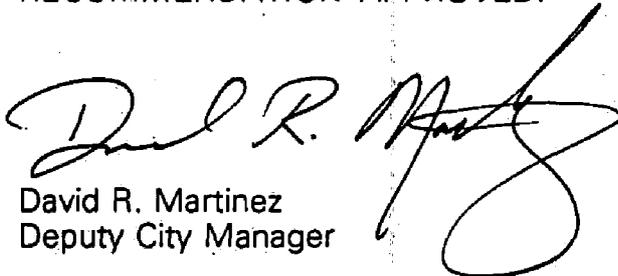
The programs herein do not directly effect MBE / WBE issues. We can expect an increase in minority and women employees and Local Business Enterprises, some of which may be MBE / WBE.

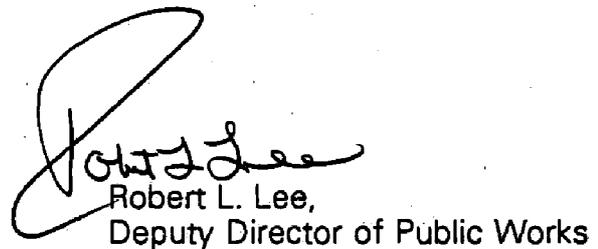
Respectfully submitted,


Duane J. Wray
Facility Manager

RECOMMENDATION APPROVED:

APPROVED


David R. Martinez
Deputy City Manager


Robert L. Lee,
Deputy Director of Public Works

AFFIRMATIVE ACTION REQUIREMENTS

Minority employee Workforce goal is 20% Woman employee Workforce goal is 6.9%

The City of Sacramento, in conjunction with the County of Sacramento and the Sacramento Housing and Redevelopment Agency (SHRA) has established the OFFICE OF EQUAL OPPORTUNITY IN CONSTRUCTION hereinafter referred to as OEOC. OEOC is formed to assist contractors in meeting the Affirmative Action requirements of the City of Sacramento. The City requires all contractors and all subcontractors to carry out the requirements as specified in this contract. A goal for minorities of 20.0% and a goal for women of 6.9% have been established. The Contractor, however, is required to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation if a specific minority group of women is underutilized)

DEFINITIONS:

As used herein:

- A. "Awarding Agency" means the agency responsible for contract enforcement.
- B. "Workforce" means the contractors aggregate working Workforce hours, within the County of Sacramento, (Excluding clerical staff)
- C. "Minority" includes:
 - (1) Black Americans (all persons having origins in any of the Black African racial groups not of Hispanic origin);
 - (2) Hispanic Americans (all persons of Mexican, Puerto Rican, Cuban, Central or South American or Spanish Culture or origin, regardless of race;
 - (3) Asian or Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands); and
 - (4) Native American (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

REQUIREMENTS

1. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract of a value in excess of \$25,000 the provisions of these specifications.
2. The Contractor by affixing their signature to this contract is accepts the terms of this agreement and the affirmative action obligations under this contract. Contractors must be able to demonstrate their participation in and compliance with the provisions of these Affirmative Action Requirements. Each Contractor or Subcontractor is individually required to make a conscientious endeavor (as defined in paragraph's 6a through 6o herein) to achieve each goal in each trade in which it has employees (permanent, temporary, or part time).
3. The Contractor shall implement the specific affirmative action standards provided in paragraph's 6a through 6o herein. The goals set forth above are expressed as percentages of the total hours of employment and training attributable to minority and female utilization. The Contractor is expected to make uniform progress through a conscientious endeavor toward meeting and maintaining the goals in each craft during the period of this contract.

4. As a material provision of this contract, the Contractor agrees to meet these Affirmative Action requirements and require all Subcontractors at all tiers to meet these Affirmative Action requirements. Any Contractor or Subcontractor whose workforce does not achieve the Affirmative Action requirements will be required to take the necessary action to attain the requirements or document a conscientious endeavor to attain the requirements. If affiliated with the local Union Hall for a specific craft, then each signatory Contractor shall be deemed to be in compliance if the local union hall working membership consists of 20% Minority employees and 6.9% women employees. Neither the failure of a local Union Hall to attain these Affirmative Action requirements, nor the terms and conditions of any collateral labor agreement, shall excuse the Contractor or any Subcontractor with compliance with these requirements. Each Contractor or Subcontractor shall take direct action to ensure Affirmative Action Compliance or exercise a conscientious endeavor to attain the goals.
5. In order for the non-working training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a written commitment to employ the apprentices and trainees at the completion of their training. This commitment is subject to the availability of employment opportunities, and may be verified by the OEOC Program Coordinator. Trainees must be trained pursuant to training programs approved by the California Department of Apprenticeship Standards (DAS).
6. Any Contractor who does not meet the Affirmative Action goals shall take the following specific actions. The evaluation of the Contractor's compliance with these specifications shall be based upon verifiable data that directly demonstrates efforts to achieve maximum results from its actions. The Contractor shall document these efforts fully and shall implement affirmative action steps at least as extensive as the following:
 - a. The Contractor shall specifically ensure that all foremen, superintendents and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain affirmative actions, with specific attention to minority or female individuals working at such sites or in such facilities.
 - b. Contact the OEOC Program Coordinator for referrals from the established pool, for all employment opportunities, before making a selection for hire. If OEOC is unable to provide an acceptable employee to meet the requested skill level or trade requirement, the contractor may provide notification of job vacancy to other recruitment sources. If the contractor has not achieved or maintained the required goals, they shall request a minority and female employee, and shall maintain a record of the other recruitment sources responses.
 - c. Continue outreach and maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union or other recruitment source, and provide these referrals to the OEOC Program Coordinator as they become available. Contractor shall document what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken. This file shall be available for the OEOC Program Coordinator to inspect, upon request.
 - d. If affiliated with a local Union Hall for a specific craft, and the local hall is in compliance with these Affirmative Action requirements, then each signatory Contractor shall be deemed to be in compliance. If the local hall is not in compliance, immediate written notification to the Awarding Agency shall be provided when the union or unions has not referred to the Contractor a minority person or woman or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations. The Contractor's obligation to meet the goals shall not be diminished by this action.
 - e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. Quarterly, the Contractor shall provide notice of participation in these programs to the OEOC Program Coordinator.
 - f. Establish and implement a company Affirmative Action policy identifying such concerns as rehires, new hires, termination's, promotions, etc.. If affiliated with labor union, provide notice of the policy to the signatory unions and training programs and request their cooperation in assisting in meeting the obligations

required by company policy and this contract. Additionally, disseminate the policy by including it in company policy manual. Publicize it in the company newspaper, annual report, etc.; review the policy with management personnel and with all minority and female employees at least once a year; and by posting the company policy on bulletin boards accessible to all employees at each location where construction work is performed.

- g. Review at least quarterly, the company's Affirmative Action policy and Affirmative Action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions, including specific review of these items with on-site supervisory personnel such as Superintendents, General Foreman, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
 - h. Disseminate the Contractor's Affirmative Action policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's Affirmative Action policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.
 - i. Direct recruitment efforts and requirements, both oral and written, to the OEOC Program Coordinator. At the earliest time possible, normally one month before the date of acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to the OEOC Program Coordinator, describing the openings, screening procedures, and tests to be used in the selection process.
 - j. Encourage present minority and female employees to recruit other minority persons and women, refer these persons to the OEOC Program Coordinator, and where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of the Contractor's work force.
 - k. Annually, validate all tests and other selection requirements for new hires, and promotions within. Provide copies of this process to the OEOC Program Coordinator for review and acceptance.
 - l. Conduct at least annually an inventory and evaluation of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.
 - m. Ensure that seniority practices, job classifications, work assignments and other personnel practices do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the policy and the Contractor's obligations under these specifications are being carried out.
 - n. Document and maintain a record of all solicitations of offers for subcontracts to minority business enterprises (MBE) and women business enterprises (WBE) construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.
 - o. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's affirmative action obligations.
7. Contractors are encouraged to participate in voluntary associations which assist in fulfilling their affirmative action obligations. The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the Contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 6a through 6o herein provided that the Contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the benefits of the program are reflected in the Contractor's minority and female work force participation, makes a conscientious endeavor to meet its individual goals, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

8. The Contractor shall not use the goals or affirmative action standards to discriminate against any person because of race, color, religion, sex, national origin, age, veteran's status or disability.
9. The Contractor shall not enter into any subcontract with any person or firm debarred from local, city, state or federal government contracts pursuant to these Affirmative Action Requirements or Executive Order 11246, as amended.
10. The Contractor shall carry out such sanctions and penalties for violation of these specifications, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to these Affirmative Action Requirements or Executive Order 11246, as amended, or requirements of this contract. Any Contractor who fails to carry out such sanctions and penalties shall be in violation and may be terminated.
11. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company Affirmative Action policy is being carried out, to submit reports relating to the provisions hereof as required by the awarding agency, and to keep records. This official will coordinate with OEOC for all hires and request assistance as necessary to comply with the affirmative action requirements of this contract. The records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice, trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, Contractors shall not be required to maintain separate records. These records shall be available for inspection by the awarding agency or the OEOC Program Coordinator, upon reasonable notification.
12. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

REPORTING REQUIREMENTS

1. All contracts and subcontracts are subject to the reporting requirements.(each subcontract of a value in excess of \$25,000
2. Contractors must submit a CC-257 (Monthly Employee Utilization Report) to the County of Sacramento Labor Compliance office at 3020 Explorer Drive, Suite #3, Sacramento, CA 95827. This report must arrive no later than the 5th working day of each month.
3. Failure to report is automatic cause to find the Contractor in non-compliance.
4. Each report is monitored by OEOC and measured against the specified goals for minorities and women.

COMPLIANCE AND ENFORCEMENT

1. During the performance of this contract, the city may withhold contract progress payments of a value not less than \$1,000 or more than \$10,000 for violations of the affirmative action requirements. Withholdings made shall be retained until the offending contractor or subcontractor provides to the OEOC Program Coordinator, a satisfactory detailed affirmative action plan that will correct the violation.
2. Every contractor or subcontractor, or any firm, corporation, partnership or association in which the contractor or subcontractor has a substantial interest who is found by the city manager to be in willful violation of the provisions of these Affirmative Action requirements, with the intent to defraud shall be ineligible to bid on or receive a contract paid out of moneys deposited in the city's treasury for a period of not more than five years from the date such determination is made by the city manager.

