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OFFICE OF THE CITY CLERK
OAKLAND

2017 MAY 12 AM 9:07

AGENDA REPORT

TO: Sabrina B. Landreth
City Administrator

FROM: Deborah Lusk-Barnes
Director, Contracts and
Compliance

SUBJECT: Disparity Study Contract Award

DATE: May 1, 2017

City Administrator Approval

Date:

5/11/17

RECOMMENDATION

Staff Recommends That The City Council Adopt a Resolution Authorizing The City Administrator To Negotiate And Execute A Professional Services Contract With Mason Tillman Associates, LTD, In An Amount Not To Exceed \$490,875.00 (Four Hundred Ninety Thousand Eight Hundred Seventy-Five Dollars) To Complete the Race and Gender Disparity Study for the City of Oakland.

EXECUTIVE SUMMARY

The City Administrator's Office Contracts and Compliance Division received two proposals in response to the Request for Proposals (RFP): Mason Tillman Associates, LTD and Miller-3 Consulting, Inc. An independent consultant was engaged to evaluate the proposals. Both proposals met the minimum requirements as set forth in the RFP, with the exception of the 50 percent Local/Small Local Business Enterprise Program (L/SLBE). At 13.40 percent L/SLBE participation, Miller-3 Consulting, Inc. (Miller-3) did not satisfy this requirement and suggested that this requirement be waived.

Overall, Mason Tillman Associates, (MTA):

- Ranked first achieving a score of 108.
 - (Miller-3 ranked second by achieving a score of 93.
- Performed the City's previous Disparity Study.
- Is a local certified firm and surpassed the 50 percent L/SLBE participation requirement with 98.47 percent proposed participation.
- Is familiar with the City's internal data systems.
- Is familiar with the Oakland business market.
- Is familiar with the demographics of the Oakland geographic region.

Item: _____

Finance and Management Committee

May 23, 2017

BACKGROUND / LEGISLATIVE HISTORY

The City of Oakland is a key player in the Oakland economy through its multi-million dollar purchasing and contracting activities, grants, and informal procurements. The City seeks to ensure fair and equitable opportunities for the Oakland market and to ensure that the City is not actively or passively discriminating against all businesses in general and in particular, against small and emerging businesses and minority and women-owned business enterprises (M/WBE).

November 5, 1996, Proposition 209 amended the California Constitution to prohibit public institutions from discriminating on the basis of race, sex, or ethnicity. The Proposition prohibits California public entities from continuing or implementing any race or gender-based preferential contracting programs. Subsequent rulings have further clarified the reach of Proposition 209 and further defined flexibilities for local government entities¹. The City wishes to access those flexibilities in the application of public policies designed to ensure a level playing field for the entire Oakland market including race specific goals if the City has a compelling governmental interest to do so and if not, the City seeks strategies to enhance the existing race neutral policies and programs that will increase the level of participation for underutilized businesses.

In response to Proposition 209, in 1996, Oakland voters added Section 808(b) to the City Charter obligating the City to conduct a "race and gender disparity evaluation to determine if the City has been an active or passive participant in actual, identifiable discrimination within its relevant market place." Moreover, "if such disparity evaluation evidences such discrimination the City Council, in order to remedy the discrimination shall establish a narrowly tailored race and/or gender business participation program, as substantiated by the disparity evaluation for the bidding and awarding of purchases and contracts. Any such program shall continue only until the discrimination has been remedied. The City Administrator or an officer authorized by her shall require all awardees and bidders to comply with the established program."

¹ **California Constitution Art. I, Sec. 31 provides:**

- (a) The State shall not discriminate against, or grant 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.
- (b) This section shall apply only to action taken after the section's effective date.
- (c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
- (d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.
- (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.
- (f) For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the State.
- (g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.
- (h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Over the years, the fiscal strength of some local government entities was severely compromised resulting in bankruptcy claims. The City sustained operations by applying several fiscal strategies including reducing spending down to the bare essentials of City government, staff reductions, Hiring freezes, deep departmental cuts, and the unions agreeing to withholding merit increases. During those hard economic times in the best fiscal judgement, the cost of a disparity study was regrettably prohibitive. Oakland survived those most difficult times and Council subsequently allocated funds to conduct a disparity study. Due to limited staffing and competing priorities, it took an unacceptably long time to bring the study to this point. In spite of the difficulties, staff is pleased to present the recommendation to engage MTA. LTD, as the consultant to initiate the City's 2017 Disparity Study.

As a strong addition to this effort, Council approved the creation of the Department of Race and Equity. The Director will be consulted throughout the disparity study process. The data and implementation will be viewed through a race and equity lens with the prospect of enhancing the potential for race based goals or stronger race neutral strategies.

In spite of the above, the City of Oakland still champions local Oakland business participation, by implementing several local business enhancement strategies including but not limited to (a) up to 12 additional preference points for professional services (b) up to five percent bid discounts in construction contract bidding, (c) reducing business size standards by taking 30 percent of state size standards to define small businesses, (d) creating a very small certification category to stimulate very small business participation, and most significantly (d) City Council substantially increased the 20 percent Local/Small Local Business Enterprise Program to a very strong and effective 50 percent L/SLBE Program.

The City continues to monitor and enforce compliance with the City's local geographic preference program known as the 50 percent Local and Small Local Business Enterprise (L/SLBE) Program. Through this assertive program, dollars are tracked and counted according to the number of certified L/SLBE firms. While race neutral, the City has awarded millions of dollars in contracts to certified L/SLBE firms. For example, for fiscal year 15-16, Council's social justice policies have resulted in 58.40 percent local Oakland business participation representing approximately \$6.2 million dollars with 11.39 percent participation of M/WBEs representing \$1.3 million dollars.

In September 2005, the City of Oakland and Redevelopment Agency ("City") commissioned the Fairness in Purchasing and Contracting Disparity Study. Mason Tillman Associates, Ltd., of Oakland, California was selected by the City Council to perform the study. The purpose of the City's Fairness in Purchasing and Contracting Disparity Study was to determine if the City was actively or passively discriminating against minority and woman owned business enterprises (M/WBEs). The study was mandated by Section 808 (b) of the City Charter, which required the City to conduct such a disparity study. The prime utilization analysis included four industries: construction, architecture and engineering, professional services, and goods and other services. The study covered procurement activities between July 1, 2002 and June 30, 2005.

The framework for the previous study reflected the consultant's careful understanding of key legal principles as they relate to disparity studies and recommendations for a remedial program including considering the possibility of narrowly tailored, race based goals.

A bibliography of all legal sources and case laws was included. The study provided the City of Oakland with evidence, in accordance with the U.S. Supreme Court decisions in the cases of City of Richmond v. J.A. Croson Co., Milliken v. Michigan Road Builders Association, Adarand Contractors, Inc. v. Pena, and Proposition 209 (Article 1, Section 31, of the California State constitution) to allow the City to determine whether or not and to what extent a race and gender conscious remedial program is justified. If grounds exist for continuing, amending, or developing narrowly tailored remedial strategies to promote the participation of minority, non-minority, and women businesses the City could take action to mount race specific policies. The data supported race specific strategies but the data was strongest in support of race neutral strategies. After great debate, Council subsequently chose to follow the strongest data supporting race neutral strategies.

In the landmark decision J.A. Croson V City of Richmond, the majority ruling established a minimum condition that there must be a significant statistical disparity between the number of qualified minority and non-minority firms ready, willing, and able to perform a particular service and the number of such firms actually engaged by the locality or the locality's prime contractors. The Court held that local governments might establish minority business set-aside programs in order to remedy the effects of past discrimination. The Court made it clear that the local government must have had before it specific proof of past discrimination against minority businesses in order for such programs to survive strict scrutiny.

Given data to support statistically significant underutilization that will pass strict scrutiny, the City wishes to implement race and gender specific policies to level the playing field for underutilized groups specifically marginalized businesses of color in the Oakland geographic market. Through strong defensive policies it is the City's intent to minimize active and passive discrimination in purchasing and contracting for minority and women-owned businesses attempting to survive in the highly competitive Oakland market.

ANALYSIS AND POLICY ALTERNATIVES

The scope of the disparity study includes a review and analysis of social justice policies, contracting procedures, and procurement practices of all City departments; and review of purchase orders, contracts, and grants awarded to for-profit and not-for-profit prime contractors and sub vendors, consultants, and grantees within the Oakland geographic market.

The consultant will view the City of Oakland's procurement and disbursement activities within the context of four major primary categories:

1. Construction Services (i.e. renovation of existing or building of new public structures, repair of streets and roads);
2. Commodities (i.e. unit priced items, products, equipment and supplies);
3. Professional Services (i.e. consulting, architecture, engineering); and
4. Grants (i.e. Federal and State funded awards and are typically for non-construction services.

The consultant will provide specific recommendations relative to spending patterns using the following dollar ranges: a) Under \$5,000.00; b) \$5,000.00 - \$25,000.00; c) \$25,001-\$99,999.00;

d) \$100,000.00 to \$250,000; and e) \$250,000 and above.

The length of the study shall cover the last five most recent fiscal years as follows: 2011-2012; 2012-2013; 2013-2014; 2014-2015; and 2015-2016.

The City operates decentralized contracting and procurement systems with primary management points within Purchasing Services for commodities, Public Works for Construction Services and Contracts and Compliance for Professional Services. Grants are managed by several departments most notably Human Services. The City of Oakland maintains purchasing and contracting data in the citywide financial system through the Comptroller's Office, which includes the Purchasing Services Division. Contracts and Compliance maintains contracts and L/SLBE participation data, and Public Works maintains construction contract data and construction related Architectural & Engineering (A&E) services.

In addition to the above, the consultant must for example:

1. Identify the relevant geographic market as a subset of the Alameda County market area. The City is most interested in first evaluating the Oakland geographic market in light of local goals and then the geographic market.
2. Identify the number of ready, willing and able businesses including Disadvantaged Business Enterprises (DBE), Minority Business Enterprises (MBEs) and Women-Owned Business Enterprises (WBE) and non-minority/women owned businesses.
3. Recommend the most appropriate definition of "disadvantaged business" in line with a possible race specific program.
 - The definition must take into consideration but need not be limited to: ethnicity, gender, location, number of years in business, personal net worth, size in terms of gross receipts, and size in terms of number of employees.
4. Collect valid defensible anecdotal data critical to shaping effective remedies that conform to current case law.
5. Conduct a "But for Analysis" to include: (a) historical context analysis and an (b) oral history analysis, and an (c) analysis of anecdotal data to determine patterns and/or practices (if any) of discrimination against non-minorities, minorities and women owned businesses.
6. Evaluate City of Oakland's social justice policies, contracting procedures, and procurement practices of all City departments.
7. Consider narrowly tailored race and gender specific remedies as well as the impact of the City's current race and gender neutral strategies.
8. Build a strong defensible case to support findings in the event of legal challenges to include but may not be limited to: (a) explaining study findings and methodology to the City Council and Council committees as requested; (b) testify in any litigation relating to the study or otherwise assist the City Attorney in any litigation related to the consultant's work on the project; and (c) assist in managing the presentation of public testimony relative to underutilization.
9. Complete the actual study in approximately twelve months, as specified in the MTA proposal as shown in Table 6 below.

Table 6: Mason Tillman’s Proposed Project Study Tasks and Timeline

Task No.	TASK DESCRIPTION	MONTHS												
		1	2	3	4	5	6	7	8	9	10	11	12	
SCOPE OF WORK														
1	Kick-off Meeting	█												
2	Legal Review	█												
3	Procurement Review	█												
4	Utilization Analysis	█	█											
5	Geographic Market Determination		█											
6	Availability Data Collection and Analysis			█	█									
7	Disparity Analysis				█	█	█	█						
8	Perform Anecdotal Analysis			█	█	█	█	█	█	█				
9	Recommendations										█	█		
STUDY REPORTING														
10a	Work Plan	█												
10b	Monthly Progress Reports	█	█	█	█	█	█	█	█	█	█	█	█	█
10c	Client Meeting	█	█	█	█	█	█	█	█	█	█	█	█	█
10d	Draft Report											█		
10e	Final Report													█

FISCAL IMPACT

Funds in the amount of \$490,875 are available for this professional services contract in the General Purpose Fund (1010), Contract Compliance Organization (02611), Disparity Study Project (1001207), Disparity Study Task (A468576), Disparity Study Award (21407).

PUBLIC OUTREACH / INTEREST

Approximately 65 hours of public outreach will be conducted with major stakeholders, community and membership organizations such as Chambers of Commerce. Outreach meetings will be offered to each council member for each council district and at least one town hall meeting.

During the previous study, several council members joined forces and held combined outreach meetings.

COORDINATION

During the implementation phase, the following departments will be invited to participate in a leadership team of advisers and will include the Director of Race and Equity, Director of Public Works (or designee), Finance Director(or designee), Director of Human Services (or Designee), and the ACM for Administration (or designee).

PAST PERFORMANCE, EVALUATION AND FOLLOW-UP

The recommended consultant MTA conducted the previous disparity study titled Fairness in Purchasing and Contracting. The consultant's performance exceeds expectations and remained flexible to a number of additional requests from the City Council.

SUSTAINABLE OPPORTUNITIES

Economic: Increase contracting and procurement opportunities for underutilized Minority Business Enterprises.

Environmental: There are no environmental impacts.

Social Equity: Adjust for disparities and address implicit and explicit bias in the City's contracting and procurement process.

ACTION REQUESTED OF THE CITY COUNCIL

Staff requests City Council Adopt a Resolution Authorizing The City Administrator To Negotiate And Execute A Professional Services Contract With Mason Tillman Associates, LTD, In an Amount Not to Exceed \$490,875.00 (Four Hundred Ninety Thousand Eight Hundred Seventy-Five Dollars) To Complete the Race and Gender Disparity Study for the City of Oakland.

For questions regarding this report, please contact Deborah Lusk-Barnes, Director, Contracts and Compliance at (510) 238-6270 or dbarnes@oaklandnet.com.

Respectfully submitted,



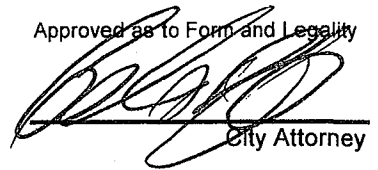
Deborah Lusk-Barnes, Director
Contracts and Compliance Division
City Administrator's Office

Prepared by:
Mary Mayberry, Administrative Services
Manager

Reviewed by:
Ron San Miguel, Sr. Contract Compliance
Officer.

FILED
OFFICE OF THE CLERK
OAKLAND

OAKLAND CITY COUNCIL


City Attorney

2017 MAY 12 AM 9:00
RESOLUTION No. _____ C.M.S.
Introduced by Councilmember _____

RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO NEGOTIATE AND EXECUTE A CONTRACT WITH MASON TILLMAN ASSOCIATES LTD, IN AN AMOUNT NOT-TO-EXCEED FOUR HUNDRED NINETY THOUSAND EIGHT HUNDRED SEVENTY-FIVE DOLLARS (\$490,875.00) TO COMPLETE THE RACE AND GENDER DISPARITY STUDY FOR THE CITY OF OAKLAND

WHEREAS, the City of Oakland Charter was amended in 1996 adding Section 808(b) which requires the City to conduct “a race and gender disparity evaluation to determine if the City has been an active or passive participant in actual, identifiable discrimination within . . .” Oakland’s marketplace; and

WHEREAS, the City seeks to ensure equal opportunity in the marketplace and to ensure that as market participants, the City and Agency are not actively or passively discriminating against minority-owned business enterprises (MBE) or women-owned business enterprises (WBE) which is consistent with the mandate of City Charter Section 808(b); and

WHEREAS, a detailed request for proposals (RFP) was prepared and mailed to firms across the country and a solicitation advertisement was also placed in the East Bay Times/Oakland Tribune, El Mondo, San Francisco Chronicle, Oakland Post; and the City of Oakland’s iSupplier.

WHEREAS, interested firms were invited to participate in a voluntary pre-proposal conference the purpose of which was to explain the City’s social equity policies and answer technical questions the consultants had with regard to the proposal; and

WHEREAS, two firms submitted proposals and one of those firms (Mason Tillman Associates, LTD) met or exceeded the City’s minimum 50% local and small local business participation requirement and the other (Miller³ Consulting, Inc.) did not; and

WHEREAS, Mason Tillman & Associates was ranked as number one by the independent consultant (J. Rita McNeil Danish), and Miller³ Consulting, Inc. was ranked second; and

WHEREAS, based on the ranking by the independent consultant, Mason Tillman & Associates LTD, (a) ranked first achieving a score of 108; (b) performed the City’s previous Disparity Study; (c) Is a local certified firm and surpassed the 50% L/SLBE participation requirement with 98.47% proposed participation; and (d) is familiar with the City’s internal data systems, and Oakland business and geographic markets; and

WHEREAS, the City of Oakland is a key player in the Oakland economy through its multi-million dollar purchasing and contracting activities, grants and informal procurements; and

WHEREAS, the City seeks to ensure fair and equitable opportunities for the Oakland market and to ensure that the City is not actively or passively discriminating against all businesses in general and in particular, against small and emerging businesses and minority and women-owned business enterprises (M/WBE); and

WHEREAS, the scope of the disparity study includes a review of purchase orders, contracts and grants awarded to for-profit and not-for-profit prime vendors/contractors/consultants/grantees and sub – vendors/contractors/consultants/grantees within the Oakland geographic market; and

WHEREAS, the consultant will view the City of Oakland’s procurement and disbursement activities within the context of four major primary categories:

1. Construction Services (i.e. renovation of existing or building of new public structures, repair of streets and roads);
2. Commodities (i.e. unit priced items, products, equipment and supplies);
3. Professional Services (i.e. consulting, architecture, engineering);
4. Grants (i.e. federal and state funded awards and are typically for non-construction services; and

WHEREAS, the consultant will provide specific recommendations relative to spending patterns using the following dollar ranges: a) Under \$5,000.00; b) \$5,000.00 - \$25,000.00; c) \$25,001-\$99,999.00; d) \$100,000.00 to \$250,000 and e) \$250,000 and above; and

WHEREAS, the length of the study shall cover the last five (5) most recent fiscal years as follows: 2011-2012; 2012-2013; 2013-2014; 2014-2015 and 2015-2016; and

WHEREAS, the consultant will be required to:

1. Identify the relevant geographic market as a subset of the Alameda County market area. The City is most interested in first evaluating the Oakland geographic market in light of local goals and then the geographic market.
2. Identify the number of ready, willing and able businesses including Disadvantaged Business Enterprises (DBE), Minority Business Enterprises (MBEs) and Women–Owned Business Enterprises (WBE) and non-minority/women owned businesses.
3. Recommend the most appropriate definition of “disadvantaged business” in line with a possible race specific program, to the extent defensible.
 - a. The definition must take into consideration but need not be limited to: ethnicity, gender, location, number of years in business, personal net worth, size in terms of gross receipts, and size in terms of number of employees.
4. Collect valid defensible anecdotal data critical to shaping effective remedies that conform to current case law.
5. Conduct a “But for Analysis” to include: (a) historical context analysis and an (b) oral history analysis, and an (c) analysis of anecdotal data to determine patterns and/or practices (if any) of discrimination against non-minorities, minorities and women owned businesses.

6. Evaluate City of Oakland's social justice policies, contracting procedures, and procurement practices of all City departments.
7. Consider narrowly tailored race and gender specific remedies as well as the impact of the City's current race and gender neutral strategies.
8. Build a strong defensible case to support findings in the event of legal challenges to include but may not be limited to: (a) explaining study findings and methodology to the City Council and Council committees as requested; (b) testify in any litigation relating to the study or otherwise assist the City Attorney in any litigation related to the consultant's work on the project; and (c) assist in managing the presentation of public testimony relative to underutilization; and

WHEREAS, the City Council finds and determines that the services provided under the agreement authorized hereunder are of a professional and temporary nature and shall not result in the loss of employment or salary by any person having permanent status in the competitive civil service; and

WHEREAS, funding was previously allocated for the disparity study, and \$490,875 is available for this professional services contract in the General Purpose Fund (1010), Contract Compliance Organization (02611), Disparity Study Project (1001207), DCP Administration Program (IP70); now, therefore, be it

RESOLVED: That the City Council hereby authorizes the City Administrator to negotiate and enter into a contract for the Race and Gender Disparity Study for the City of Oakland with Mason Tillman Associates, Ltd. covering the last five (5) most recent fiscal years (2011-2012; 2012-2013; 2013-2014; 2014-2015 and 2015-2016), in an amount not-to-exceed four hundred ninety thousand eight hundred seventy-five dollars (\$490,875.00); and, be it

FURTHER RESOLVED: That the contract shall be reviewed and approved by the City Attorney's Office for form and legality and a copy placed on file in the office of the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, CAMPBELL WASHINGTON, GALLO, GIBSON MCELHANEY, GUILLEN, KALB, KAPLAN, AND PRESIDENT REID

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____

LaTonda Simmons
 City Clerk and Clerk of the Council
 of the City of Oakland, California