

CITY OF OAKLAND

AGENDA REPORT

FILED
OFFICE OF THE CITY CLERK
OAKLAND

2010 MAR 11 PM 6:29

TO: Office of the City Administrator
ATTN: Dan Lindheim
FROM: Department of Contracting and Purchasing
DATE: March 23, 2010

RE: **Action on a Report on the Seven (7) Major Findings and Recommendations of the Fairness in Contracting and Purchasing Disparity Study**

SUMMARY

On September 29, 2009, Oakland City Council approved and adopted a report on the findings and race neutral recommendations of the Fairness in Purchasing and Contracting Disparity Study.

Seven policy recommendations were identified and moved to the Community and Economic Development (CED) Committee for further discussion. The policy recommendations for “for-profits” and “Not for Profits” are as follows:

1. Review current City of Oakland size standards to match the Oakland market.
2. Create a Very Small Business Enterprise Category (VSBE) - Including a discussion of “very small” or “emerging” categories in other localities as well as the feasibility of an additional category for “Small and Locally Produced Goods”(SLPG/LPG) -
3. Goal Setting (From 20% participation requirement to 50% participation requirement) – To include setting goals on a project by project basis.
4. Maintaining Subcontractor Participation Levels.
5. Satisfying Non-Compliance Shortfalls – to include the application of penalties.
6. Unbundle Large Procurements into Smaller Contracts Where Feasible – to include a discussion of how to implement at the using agency level.
7. Small Contracts Rotation Program - to include current strategies implemented by the Community and Economic Development Agency.

FISCAL IMPACT

The recommendations mentioned above will not carry a direct internal fiscal impact.

BACKGROUND

On May 22, 2007, staff submitted Volume I of the Fairness in Purchasing and Contracting Disparity Study. The study represented data constructed from Oracle data, city-wide records, surveys and interviews. The study covered a three year period from 2002 to 2005.

Item: _____
CED Committee
March 23, 2010

This data has not passed the 10 year threshold as indicated in previous cases challenging disparity study findings.

The Volume I disparity study data was separated into four major industries for purposes of the analysis: (a) Construction; (b) Architecture & Engineering; (c) Professional Services; and (d) Goods and Other Services. The previous report included an analysis of findings of disparity by contract thresholds (i.e. \$15,000, \$50,000 and \$500,000), trade category, ethnicity and gender. Per findings in this study, disparities were found across ethnicities and for women in various categories especially when combined as Minority/Women Owned Business Enterprises.

Mason Tillman Associates, Ltd submitted a comprehensive set of race neutral recommendations based on the statistical analysis of spending by the City of Oakland. The findings suggest disparities in some areas of contracting. The September 29, 2009 council agenda report summarized the race and gender recommendations and provided full study documents.

The disparity study in general and the seven specific program recommendations were adopted by Council and are now returning to the CED Committee for additional discussions.

KEY ISSUES AND IMPACTS

1) **Review Size Standards –**

Recommendation: Set the city’s size standards at 10% of the 2008 size standards for construction firms and 15% for professional services firms.

Table 1-A

Selected NAICS Codes	Current City Size Standards	* Oakland SLBE Certified Firms.	Percentages of 2008 SBA Size Standards in Millions	
			15%	10%
CONSTRUCTION				
236115 - New Single Family Housing Construction	8.55	0.79		3.35
237310 - Highway, Street and Bridge Construction	8.55	2.6		3.35
238210 - Electrical Contractors	3.6	1.4		1.4

Item: _____
 CED Committee
 March 23, 2010

Table 1-B

Selected NAICS Codes	Current City Size Standards	* Oakland SLBE Certified Firms.	Percentages of 2008 SBA Size Standards in Millions	
			15%	10%
PROFESSIONAL SERVICES				
541310 - Architectural Services	1.2	0.44	0.675	
541330 - Engineering Services	1.2	0.88	0.675	
541620 - Environmental Consulting Services	1.8	0.4	1.05	

The size of a business may be defined by a number of factors that are independently established by a certifying entity. Standard industry practices consider at least two basic factors: (1) dollar amounts/dollar thresholds (defined in terms of average gross receipts) and/or (2) workforce size or number of employees. The City of Oakland opted to use the three-year average gross receipts to determine the size of both for profit and not-for-profit businesses and elected to use 30% of the 2002-2003 Small Business Administration's (SBA) size standards to define the category of small businesses.

SBA size standards are determined by very complex calculations specific to the industry for which dollar thresholds are set. However, because these industries are viewed nationally, SBA thresholds are significantly larger than the Oakland market.

Tables 1 and 2 show a sample of (a) Specialty Trades and (b) Professional, Scientific and Technical Services for the 2002-2003 SBA, City size standards and the current 2008 SBA size standards. The last column (**) shows what might be the City's size standard if we take 30% of the most recent 2008 standards.

Table 2 -A – Comparison of Current and Revised SBA Size Standards – Specialty Trades

Industry	Current Standards		If we update to 2008 standards	
	2003 SBA	City 30%	2008 SBA	**City 30%
Specialty Trades				
Poured Concrete Foundation and Structure Contractors	\$12.00	\$3.60	\$14.00	\$4.20
Structural Steel and Pre cast Concrete Contractors	\$12.00	\$3.60	\$14.00	\$4.20
Framing Contractors	\$12.00	\$3.60	\$14.00	\$4.20
Masonry Contractors	\$12.00	\$3.60	\$14.00	\$4.20

Table 2-B - Comparison of Current and Revised SBA Size Standards – Professional, Scientific and Technical Services

Professional, Scientific and Technical Services				
Architectural Services	\$4.00	\$1.20	\$4.5	\$1.20
Landscape Architectural Services	\$6.00	\$1.8	\$7.0	\$1.80
Engineering Services	\$4.00	\$1.20	\$4.5	\$1.20

Staff considered size standards as a percentage of existing Oakland certified businesses. It was determined, subsequent to the submittal of the consultant’s recommendations, that the City’s business tax license database is not the best data to use to demonstrate the “actual business size”. Businesses are only required to report dollars earned in Oakland. For the purpose of this analysis, it is necessary to analyze the business’s average of gross receipts to determine its size relative to other businesses in the same market. The business tax license database collects only that portion of the business’ gross receipts necessary to calculate the tax base as set forth in the City’s municipal code.

In an effort to define the Oakland market staff took into consideration several factors. First, staff identified the total number of establishments located within Oakland’s geographical boundaries. Using the most recent U.S. Census data available (2007), staff looked at Zip Code Business Patterns for the total number of establishments reporting an Oakland address, which numbers 10,360.

In comparison, the number of certified businesses as listed in the city's database is a much smaller population. Only five percent (5%) of the businesses located in Oakland are certified firms. The city's database of certified local and small local business enterprises breaks down as shown in the following chart:

Table 3

Certification Category	Number of Certified Firms	Certification Category	Number of Certified Firms	Totals
CS LBE	49	PS LBE	138	187
CS SLBE	134	PS SLBE	246	380
Totals	183		384	567

CS = Construction; PS = Professional Services

Below is a list of selected NAICS codes along with a comparison of the size standards and the average annual gross receipts for the past three years. The NAICS codes shown were selected because it is the city's policy to certify businesses for participation in construction and professional services projects.

Table 4 – Selected NAICS Codes and Average Annual Gross Receipts

SELECTED NAICS CODES	# OF FIRMS	SBA SIZE STANDARD ¹	OAKLAND SIZE STANDARD ²	Oakland Certified Firms (Average Annual Gross Receipts)			
				2006	2007	2008	AVG
236115 - New Single Family Housing Construction	9	33.5	10.05	1,355,618	530,517	322,637	.79
237310 - Highway, Street and Bridge Construction	13	33.5	10.05	3,251,072	1,872,826	3,008,802	2.6
238210 - Electrical Contractors	17	14.0	4.2	1,391,391	1,377,592	1,805,870	1.4
541310 - Architectural Services	32	4.5	1.4	481,964	452,847	312,561	.44
541330 - Engineering Services	35	4.5	1.4	753,226	874,095	1,182,285	.88
541620 - Environmental Consulting Services	20	7.0	2.10	376,072	433,717	395,886	.40

In an effort to tailor the size standards to the size profile of Oakland certified businesses, we can see from the table below that many of the certified businesses fall well below the City's current small business size standards for the selected NAICS codes. If we adjusted the size standard to 20% of the 2008 size standards, businesses still fall below the threshold for small business designation.

¹ As of August 2008, Expressed in millions of dollars

² City of Oakland Size Standard = 30% of SBA Size Standard

Even with an adjustment to 10% of the 2008 SBA size standard, with the exception of electrical contractors' and the engineering services categories, the other four categories fall below the threshold.

Table 5 - Proposed Size Standards

Selected NAICS Codes	Current City Size Standards	* Oakland Certified Firms.	Revised 2008 Size Standards	Percentages of 2008 SBA Size Standards			
				30%	20%	15%	10%
236115 - New Single Family Housing Construction	8.55	0.79	33.50	10.05	6.70	5.03	3.35
237310 - Highway, Street and Bridge Construction	8.55	2.60	33.50	10.05	6.70	5.03	3.35
238210 - Electrical Contractors	3.60	1.40	14.00	4.20	2.80	2.10	1.40
541310 - Architectural Services	1.20	0.44	4.50	1.35	0.90	0.68	0.45
541330 - Engineering Services	1.20	0.88	4.50	1.35	0.90	0.68	0.45
541620 - Environmental Consulting Services	1.80	0.40	7.00	2.10	1.40	1.05	0.70

*Average Annual Gross Receipts

In order to maintain an accurate portrayal of the City's pool of small businesses, it would then be necessary to perform this analysis on an annual basis to adjust the size standard based on the addition of gross receipts for the most recent calendar year for which data is available.

Based on consideration of the above, staff recommends setting the city's size standards at 10% of the 2008 size standards for construction firms and 15% for professional services firms.

Item: _____
 CED Committee
 March 23, 2010

2) Create a Very Small Local Business Enterprise Category (VSLBE) –

Recommendation: Staff recommends expanding the L/SLBE program to include a (a) Very Small Local Business Enterprise (**VSLBE**) category and (b) Local Business Enterprises for Locally Produced Goods (**LBE-LPG**) category.

(a) The criteria for a business to qualify as a VSLBE are:

- 1) Gross sales must not exceed \$375,000 per year based on market average;
- 2) The home business must be domiciled in Oakland for up to six months; and
- 3) The business must hold a valid Oakland business tax license.

The VSLBE certification will be valid for one year and renewable for two one year terms. Therefore a small business can be certified as a VSLBE for no more than three (3) years.

Analysis - In 1998, the Small Business Administration (SBA) initiated a pilot program that established and defined a very small business concern as one that has 15 or fewer employees together with average annual gross receipts that do not exceed \$1 million. The SBA set aside procurements of \$50,000 or less for concerns meeting the definition of a very small business enterprise.

For the purpose of this analysis staff looked at several cities organizations and jurisdictions to determine the successful implementation of such a program including:

1. San Francisco
2. San Jose
3. Alameda County
4. Alameda County Transit Improvement Authority (ACTIA)
5. Port of Oakland
6. Bay Area Rapid Transit (BART)
7. East Bay Municipal Utility District (EBMUD)
8. Alameda County Transit Authority (AC Transit)

It is important to note that Oakland Unified School District (OSUD) accepts the City of Oakland's certification criteria.

Currently, four jurisdictions near/comparable to the City of Oakland have a VSLBE category as a part of their program. They are:

1. City and County of San Francisco
2. Alameda County
3. Alameda County Transportation Improvement Authority (ACTIA)
4. Port of Oakland

The following chart provides a summary of the business classifications and size standards for those programs:

Table 6 - Entities with Very Small Local Business Enterprise Programs

Entity/Organization	Industry Category	SLBE Size Standard	VSLBE Size Standard
City and County of San Francisco (Micro-Business)	Construction Contractors	\$14,000,000	\$7,000,000
	Specialty Construction Contractors	\$7,000,000	\$3,500,000
	Goods/Material/Equipment Suppliers & General Services	\$7,000,000	\$3,500,000
	Professional Services plus A&E	\$2,500,000	\$1,250,000
	Trucking and Hauling	\$3,500,000	\$1,750,000
ACTIA (Very Small)	Professional Services and Construction Companies	\$5,000,000 \$10,000,000	\$2,000,000
Alameda County (Emerging Business)	Goods & services up to \$25,000	SBA Size per classification	<0.5 of SBA
Port of Oakland -		\$12,000,000	\$2,000,000

In order to determine the likelihood that a VSLBE program might prove beneficial to the City's pool of small businesses, staff looked at the number of businesses in the database that fell within three parameters: less than or equal to \$1 million, less than or equal to \$500 thousand, and less than or equal to \$375 thousand. The results are shown below. Thirty-six percent (36%) of the total 299 certified businesses have gross receipts less than one million dollars, 48% less than half a million dollars and 54% less than \$375,000.

Table 7

Avg Annual Gross Receipts >=\$1 million	109
Avg Annual Gross Receipts >=\$500K	145
Avg Annual Gross Receipts >=\$375K	160

In fiscal year 2008, the City spent \$200 million in construction projects. In that same year, L/SLBE firms were awarded 34% of the total construction projects awarded by the City. For professional services contracts in the same year, the City awarded \$29.9 million in contracts. L/SLBE firms were awarded \$9.2 million or 32% of the total dollars awarded. In fiscal year 2009, the City spent \$147 million in construction projects. In that same year, L/SLBE firms were awarded 39% of the total construction projects awarded by the City. For professional services contracts in the same year, the City awarded \$24.4 million in contracts. L/SLBE firms were awarded \$7.2 million or 31% of the total dollars awarded for professional services contracts.

It was suggested that the City consider giving preference to local business enterprises for locally produced goods (LBE-LPG). According to census statistics for 2007, there are a total of 460 businesses that define themselves under the manufacturing NAICS code.

A preference of this nature would further encourage contractors to utilize locally produced goods over goods obtained outside of the city, and bolster the local economy through the increased infusion of sales tax dollars, employment of Oakland residents, and the continued support of local business enterprises. The preference could be based on the cost of goods sold, much like the bid preference scheme currently in place, wherein points might be awarded on a sliding scale (from 1 to 5).

3) Goal Setting:

Recommendation: Staff recommends increasing the 20% minimum participation requirement to 50% minimum participation requirement. The Local/small Local Business Enterprise will be changed to reflect the 50% minimum requirement. In addition, staff recommends applying a requirement for small local certified primes to satisfy up to 25% participation and requiring the other 25% to be satisfied by way of subcontracting with SLBEs. In this way, we are addressing the tendency to have certified small locals satisfying the total L/SLBE requirement and subcontracting out with all non-local firms. The bid discounts will remain at a 5% limit and preference points will remain at a maximum of five.

Council adopted MTA's recommendation to increase the current 20% minimum L/SLBE Program requirement to a 50% "goal" program. The rationale put forward to support this recommendation is as follows:

"It is industry practice for corporations and the government to focus spending on their own market area. This is especially true with government agencies when the services are funded by local dollars. For example, the Alameda County Transportation Improvement Authority (ACTIA), which receives all funding from the local tax base, has established a Local Business goal of 70 percent and a Small Local Business goal of 30 percent for professional services. For construction, the goals are 60 percent for Local Business use and 20 percent for Small Local Business use. The Peralta Community College, which uses the State of California's Small Emerging Business standards, has set its Local Business goal at 25 percent. Alameda County has a 20 percent Small Local Emerging Business participation goal for all contracts. Given that local business goals in the Oakland market area range from 35 percent to 70 percent, it is recommended that the local business goal be set at 50 percent."

Prior to the existing 20% minimum participation requirements, the City operated a 50% goals program. Staff will set participation requirements (absent GFE) on a project by project basis. This approach will afford a more realistic assessment of the potential involvement of the Oakland certified local business market. Project managers, in concert with Compliance Officers, may follow procedures similar to the Disadvantaged Business Enterprise Program (DBE) analysis. In this instance, availability is determined by using a certification data base and the cost of the project by trade (including trucking, materials, and supplies). From that information an estimate can be made in terms of the potential participation. Participation requirements may range from zero to 100%. An aggregate annual goal of 50% could be set to measure overall success.

Item: _____
CED Committee
March 23, 2010

4) Maintaining Subcontractor Participation Levels –

Recommendation: Staff recommends imposing penalties on prime contractors who do not maintain L/SLBE participation. Penalties must be equal to the amount that should have been awarded to L/SLBE's if the L/SLBE goal is not achieved. At project end, businesses will be charged for the shortfall dollars that should have been awarded to certified businesses. If the firm was named on the subcontractor list and not used, the dollars will go to that certified local subcontractor.

5) Satisfying Non-Compliance Shortfalls

Recommendation: - Apply monetary penalties at 1 ½ the level of non-compliance. This recommendation is similar to a current council strategy under the Apprenticeship program where contractors may satisfy shortfalls by working sub contractors at a rate of 1 ½ times the shortfall.

6) Un bundle Large Procurements into Smaller Contracts Where Feasible –

Recommendation: Staff recommends breaking down larger projects into smaller contracts to maximize small local business participation.

While using agencies have unbundled projects in the past, the decision to un bundle on a more frequent basis must occur during the planning stages prior to solicitation of grant funding and must consider for example: (a) multi-project locations; (b) size or complexity of the service; and/or(c) buying options. Departments are encouraged assess projects before a scope of work is defined in order to determine if any portions of work may be broken down into smaller sub contractable parts. In determining whether projects should be unbundled, the following criteria should be reviewed:

- Whether or not the project takes place in more than one location;
- Size and complexity of the procurement;
- Similarity of the goods and services procured;
- Sequencing and delivery of the work;
- Public safety issues and convenience; and
- Using agency or division options.

According to MTA, bundling occurs when small purchases are consolidated into one contract, or when goods or services previously purchased individually are grouped together in a single solicitation. The federal government (while they let extremely large contracts) has made contract unbundling a key element of its small business agenda. City staff should consider unbundling large contracts to maximize small business participation.

Unbundling large procurements would increase the opportunities for L/SLBEs to compete for City contracts.

7) Implement a Small Contracts Rotation Program (CRP) –

Recommendation: Initiate a CRP to serve as a sheltered market program to identify a smaller group of pre-qualified contractors from which to bid.

Similar to a sheltered market program the proposed Small Contracts Rotation Program (CRP) requires establishing and maintaining a pre qualified list, by trade, of local certified businesses, using an engineer's estimate to serve as a guide to costs of services.

To determine the lowest responsible bidder, the City may review mark-ups and rates. Work will be bid to the pre-qualified pool on a rotating basis. Pre-qualified businesses will not be eligible to receive a 2nd work order until all others on the list have been offered at least one assignment. The City may hold quarterly, bi-annual or annual open enrollments to update the pre-qualified list. Further, MTA suggests that participants graduate from the rotation program after 3 successful work orders have been completed, or after they have been on the list for two years whichever comes first. Non responsive or non-performing participants will be dropped from the list and will forfeit the privilege of pre-qualification. As technical support strategies, MTA recommends a (a) "Prompt two-week Payment Program and (b) requesting to waive bonding wherever feasible. A bonding program could also provide strong technical support as well.

A contractor's rotation program will not only capture the small local businesses and provide reliable opportunities but will also provide an expedient way to provide small construction services desperately needed by city agencies. Staff is pleased to report that in keeping with the disparity study recommendation the Community and Economic Development Agency, Department of Engineering and Construction, Project Delivery Division, has initiated a Contractors Rotation Program (CRP). On March 2, 2010 council approved the award of nine construction contracts for on-call construction services with Bay Construction, Beliveau Engineering, Dan Peters Construction, DC Construction, JUV Inc., Malachi Construction, Rockridge Builders, Turner Group Construction, and Van Every Construction. Contracts were awarded for an amount not to exceed two hundred and fifty thousand dollars (\$250,000.00) each and as described by CEDA staff, the process was as follows: "Contractors were solicited through a Request for Qualifications process that targeted Small Local Business Enterprise (SLBE) firms only. Most of these firms have not worked with the City as a general, prime contractor. On-call construction work contracts not only facilitate the delivery of small projects promptly and efficiently, but also help to spread the work to some small local contractors that do not usually bid on City projects. On-call construction services maybe utilized for various capital improvement projects within the City's right-of-way and for its municipal facilities. These include streets and sidewalks, bike routes, creeks and waterways, bridges, parks, athletic fields, recreation centers, public safety buildings, libraries, and other municipal facilities."

This CRP has a great deal of promise in promoting enhanced use of SLBEs and CEDA's work with this CRP will serve as an excellent model city-wide.

SUSTAINABLE OPPORTUNITIES

Item: _____
CED Committee
March 23, 2010

Economic: Policies, programs and procedures tailored to the findings will result in increased opportunities for statistically significant underrepresented groups.

Environmental: Staff makes every effort to encourage the use of sustainable and recycled-content materials and technologies whenever possible.

Social Equity: Fair and equitable contracting opportunities will serve to level the competitive field. Underrepresented groups will have more access to the City's public procurement process.

DISABILITY AND SENIOR CITIZEN ACCESS

This report does not provide specific benefits or programs for disabled or senior citizens.

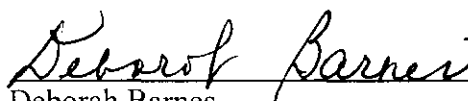
RECOMMENDATION(S) AND RATIONALE

Staff recommends implementation of the recommendations as presented in this report.

ACTION REQUESTED OF THE CITY COUNCIL

Accept the discussion of the seven policy recommendations.

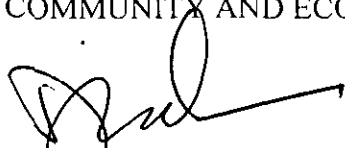
Respectfully submitted,



Deborah Barnes
Director,
Department of Contracting and Purchasing

Prepared by:
Mary Mayberry, Administrative Services Manager I

APPROVED AND FORWARDED TO THE
COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE:



Office of the City Administrator

Item: _____
CED Committee
March 23, 2010