

CITY OF OAKLAND
AGENDA REPORT

2011 MAY 12 PM 6:37

TO: Office of the City Administrator
ATTN: P. Lamont Ewell, Interim City Administrator
FROM: Department of Contracting and Purchasing
DATE: May 24, 2011

RE: A Supplemental Report Adopting the Changes to the City's Local and Small Local Business Enterprise Program as Recommended by the Fairness in Purchasing and Contracting Disparity Study

SUMMARY

This supplemental report responds to questions raised by the Community and Economic Development (CED) Committee on January 11, 2011 regarding the proposed changes to the Local and Small Local Business Enterprise Program specifically as they relate to:

1. Updating Size Standards.
 - The most appropriate criteria to define a small local Oakland business to include the relative impact of that definition on the number of certified firms.
2. Increasing the minimum 20% level of L/SLBE participation to 50%.
 - The ability of businesses to respond to the increase of the minimum requirement from 20% to 50%.
3. Amending the municipal code to implement a contractor's prequalification program and a process for awarding contracts under the program.
 - Staff will return to Council at a later date with a full vetting of the contractor's prequalification program and processes for award of contracts

Subsequent to the last CED Committee meeting and during discussions of the Request For Proposal (RFP) process for security services, the Finance and Management Committee desires to consider awarding preference points to local certified firms regardless of business size or level of subcontracting activity and to include preference points for employing Oakland residents. This report contains suggestions to meet those needs.

Secondly, staff worked with members of the business community to include business chambers and held an open forum meeting to gather comments regarding the proposed changes. A summary of those discussions are provided as well as a discussion regarding penalties and monitoring.

Item: _____
CED Committee
May 24, 2011

FISCAL IMPACT

There are no additional staff resource requirements attached to council's adoption and implementation of the policies discussed in this report.

BACKGROUND

On December 14, 2010, staff presented a report to the CED Committee outlining changes to the City's Local and Small Local Business Enterprise Program. There was general consensus around the following policies:

1. Adding two new certification categories: (a) a Very Small Local Business Enterprise (VSLBE) and (b) a Local Business Enterprise of Locally Produced Goods (LBE-LPG).
2. Applying a penalty for failure to meet L/SLBE participation at a rate of 1.5 times the amount of shortfall dollars that should have been paid to L/SLBE subcontractors and suppliers.
3. Affording contractors the opportunity to satisfy non compliance L/SLBE shortfalls by:
 - a. Payment of penalties and depositing those penalties into the general fund.
 - b. Working off shortfall dollars at a rate of 1 ½ times the money lost to L/SLBE firms on non City funded or City funded projects when the proposed level of participation has been achieved.
4. Unbundling or "right sizing" large contracts into smaller contracts when feasible as determined by the Public Works Agency.

The CED Committee requested additional information regarding the following policies:

1. Updating current business size standards.
2. Increasing the existing 20% minimum business participation requirement to 50% L/SLBE participation requirement on all projects.
 - a. Within the context of this increase, DCP staff (in concert with the using agency) will adjust the 50% participation requirement up or down (if warranted) given the nature and scope of particularly unique projects and current market conditions while maintaining an annual aggregate 50% participation level.
3. Amending the City's purchasing system to authorize a small business prequalification program and award process.

KEY ISSUES AND IMPACTS

(1) Updating Current Size Standards – Council posed the following questions:

- Should the City apply the 10% and 15% of current SBA size standards or maintain the 30% and apply it to the most recently published 2010 SBA size standards?
- Should the City adjust according to the most recent SBA size standards or hold at 2010?

Item: _____
CED Committee
May 24, 2011

- How many businesses will lose or gain SLBE certification status if the City adopts a practice of 30% of the current (2010) Size Standards?

In the previous report to the CED Committee, staff recommended that the City continue to use the SBA size standards as a guide; move from 2002 to the most recent 2010; and instead of 30% of the SBA Size Standards - take 10% of the SBA size standards to define small construction businesses and 15% of the SBA Size Standards to define small professional services businesses. This approach significantly reduces the pool of SLBE's and the size of businesses within a smaller gross receipts range.

Staff pulled available data on each certified firm in order to establish a baseline of average gross receipts. At the time the analysis was performed there were 532 certified L/SLBEs. Of that number, 358 businesses reported gross receipts and served as the baseline for this analysis. It is important to note that businesses applying for the Local Business Enterprise (LBE) certification do not have to submit gross receipts information because they exceed the Size Standard for their respective industry.

Firms certified at the current 30% of the 2002 size standards were reviewed to determine if they would retain certification based on various percentages of the 2010 size standard (30%, 20%, 15% and 10%). The results as noted below reflect the number of businesses that retain certification at each level:

Table 1

Baseline Certified	2002 Size Standards (30%)	2010 Size Standards (30%)	2010 Size Standards (20%)	2010 Size Standards (15%)	2010 Size Standards (10%)
358	299	315	287	263	232

As shown above in Table 1, at 30% of the 2002 SBA Size Standards 299 businesses were certified as SLBE because their average gross receipts fell at or below that dollar threshold. When the 2010 SBA Size Standards were used, 16 additional businesses were eligible for certification because the dollar threshold increased. The number of certified firms declined at the 20% of the 2010 threshold and continued to decline at 15% and 10%. According to the above, if the City desires to increase the number of SLBEs, then 30% of the current 2010 SBA Size Standards will garner the largest number of firms certified as small.

The following is an example of how firms may be impacted by 30% of 2002 and 30% of 2010 SBA Size Standards:

- Contractor A is classified under industry code #238210 - "Electrical Contractors and other Wiring Installation Contractors".
 - 30% of 2002 standards for industry code #238210 is \$3.2M. Therefore, the 3-year average gross receipts for Contractor A - must fall at or below the \$3.2M threshold.

- Contractor A submits tax returns that report three-year average gross receipts at \$3.78M. At 30% of the 2002 standards, this company is considered large because their average gross receipts are greater than the \$3.2M threshold.

If the City moves up to 30% of 2010 standards, Contractor A will fall below the new threshold because:

- 30% of 2010 standards for industry code #238210 is \$4.2M. At 30% of the 2010 standards, contractor A falls below the \$4.2M threshold and if the firm satisfies the other minimum requirements (i.e. has a local headquarters with a substantial presence), the firm will be eligible for certification as a Small Local Business Enterprise (SLBE).

Concurrently, by 10% of the 2010 SBA size standards, this company will be large because the threshold for that industry code is 1.4M. Table 2 provides a visual of the above scenario.

Table 2

*SS - Size Standard

3-year Avg Gross Receipts	2002 *SS @ 30%	CERT STATUS	2010 SS @ 30%	CERT STATUS	2010 SS @ 20%	CERT STATUS	2010 SS @ 15%	CERT STATUS	2010 SS @ 10%	CERT STATUS
\$3.78 M	3.6	N	4.2	Y	2.8	N	2.10	N	1.40	N

Tables 3-A and 3-B provide a sample of the 2002 Size Standards and 30% of 2002 as well as 2010 Size Standards and 30%, 20%, 15% and 10% respectively.

Table 3-A

		2002 SBA	30% 2002 SBA	2010 SBA	30% SBA	20% SBA	15% SBA	10% SBA
Sub sector 236 – Construction of Buildings								
236115	New Single-Family Housing Construction (except Operative Builders)	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35
236116	New Multifamily Housing Construction (except Operative Builders)	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35
236117	New Housing Operative Builders	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35
236118	Residential Remodelers	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35
236220	Commercial and Institutional Building Construction	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35
Sub sector 237 – Heavy and Civil Engineering Construction								
237110	Water and Sewer Line and Related Structures Construction	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35
237310	Highway, Street, and Bridge Construction	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35
237990	Other Heavy and Civil Engineering Construction	\$28.50	\$8.55	\$33.5	\$10.05	\$6.70	\$5.03	\$3.35

Size Standards have adjusted up three times since 2002. You will see that Sub Sectors 236 and 237 increased from \$28.50 to \$33.5 a \$5.10M increase. 30% shows a modest increase of \$1.5M.

Item: _____
 CED Committee
 May 24, 2011

Table 3-B

Sub sector 541 – Professional, Scientific and Technical Services		2002 SBA	30% 2002 SBA	2010 SBA	30% SBA	20% SBA	15% SBA	10% SBA
541110	Offices of Lawyers	\$6.00	\$1.80	\$7.00	\$2.10	\$1.40	\$1.05	\$0.70
541191	Title Abstract and Settlement Offices	\$6.00	\$1.80	\$7.00	\$2.10	\$1.40	\$1.05	\$0.70
541199	All Other Legal Services	\$6.00	\$1.80	\$7.00	\$2.10	\$1.40	\$1.05	\$0.70
541211	Offices of Certified Public Accountants	\$7.00	\$2.10	\$8.50	\$2.55	\$1.70	\$1.28	\$0.85
541213	Tax Preparation Services	\$6.00	\$1.80	\$7.00	\$2.10	\$1.40	\$1.05	\$0.70
541214	Payroll Services	\$7.00	\$2.10	\$8.50	\$2.55	\$1.70	\$1.28	\$0.85
541219	Other Accounting Services	\$7.00	\$2.10	\$8.50	\$2.55	\$1.70	\$1.28	\$0.85
541310	Architectural Services	\$4.00	\$1.20	\$4.50	\$1.35	\$0.90	\$0.68	\$0.45
541320	Landscape Architectural Services	\$6.00	\$1.80	\$7.00	\$2.10	\$1.40	\$1.05	\$0.70
541330	Engineering Services	\$4.00	\$1.20	\$4.50	\$1.35	\$0.90	\$0.68	\$0.45

As noted in Table 3-B, Sub Sector 541 increased from \$6M to \$7M a modest \$1M increase. 30% shows a very small increase of \$.3M.

Given the relative increases and compared to the 10% and 15% previously recommended, more businesses will be eligible for certification as a Small Local Business enterprise if the City stays with 30% of current size standards starting with 2010.

(2) 50% Participation Requirements. Council asked the following questions:

- How do businesses earn bid discounts and preference points?
- Can the Oakland market respond to an increase from a required 20% minimum participation to a required 50% minimum participation?

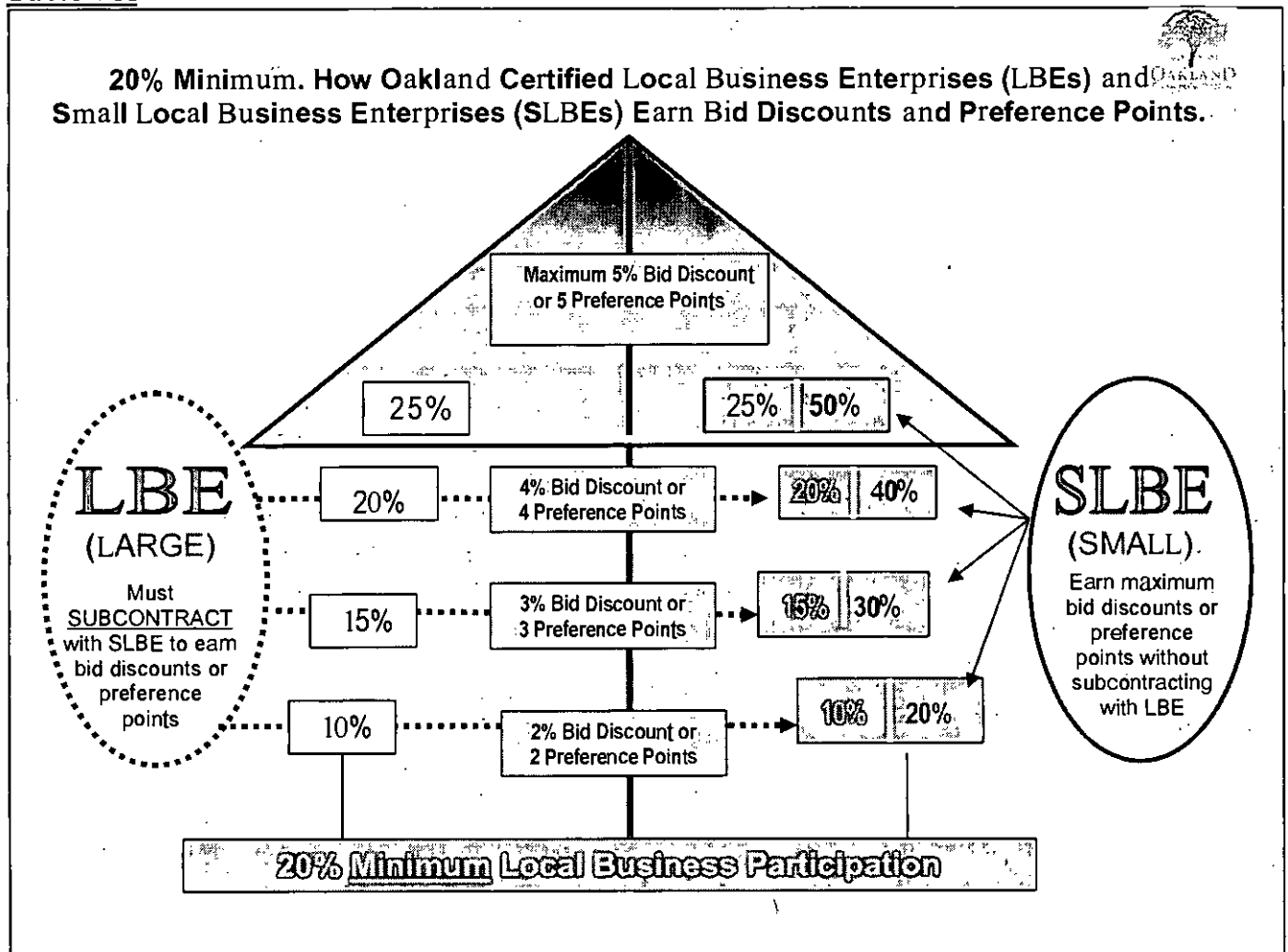
A number of questions were raised regarding the way in which businesses earn preference points and bid discounts. The current process is as follows:

1. Contractors identify subcontractors with which to work and report those subcontractors along with estimated dollar amount or size of subcontract.
2. Compliance staff verifies the list of subs to ensure certification status.
3. The dollar amount or size of all L/SLBE participation is totaled and a percentage (by LBE and SLBE) of the total project amount is determined.

4. Certified local firms (LBEs) must subcontract with SLBEs at a minimum of 10% in order to satisfy the minimum 20% requirement and in turn earn at least two bid discounts or 2 preference points.
5. Non-local firms must subcontract out at least 10% LBE and 10% SLBE or 20% SLBE in order to satisfy the minimum 20% requirement and in turn earn at least two bid discount or 2 preference points.
6. According to the L/SLBE participation, up to 5 preference points or 5% bid discounts may be earned.
7. When bid discounts are earned, the bid amount is discounted and the contract is awarded at the actual bid amount.
8. When preference points are earned, they are applied on top of the points earned for technical aspects and other performance factors related to the project.

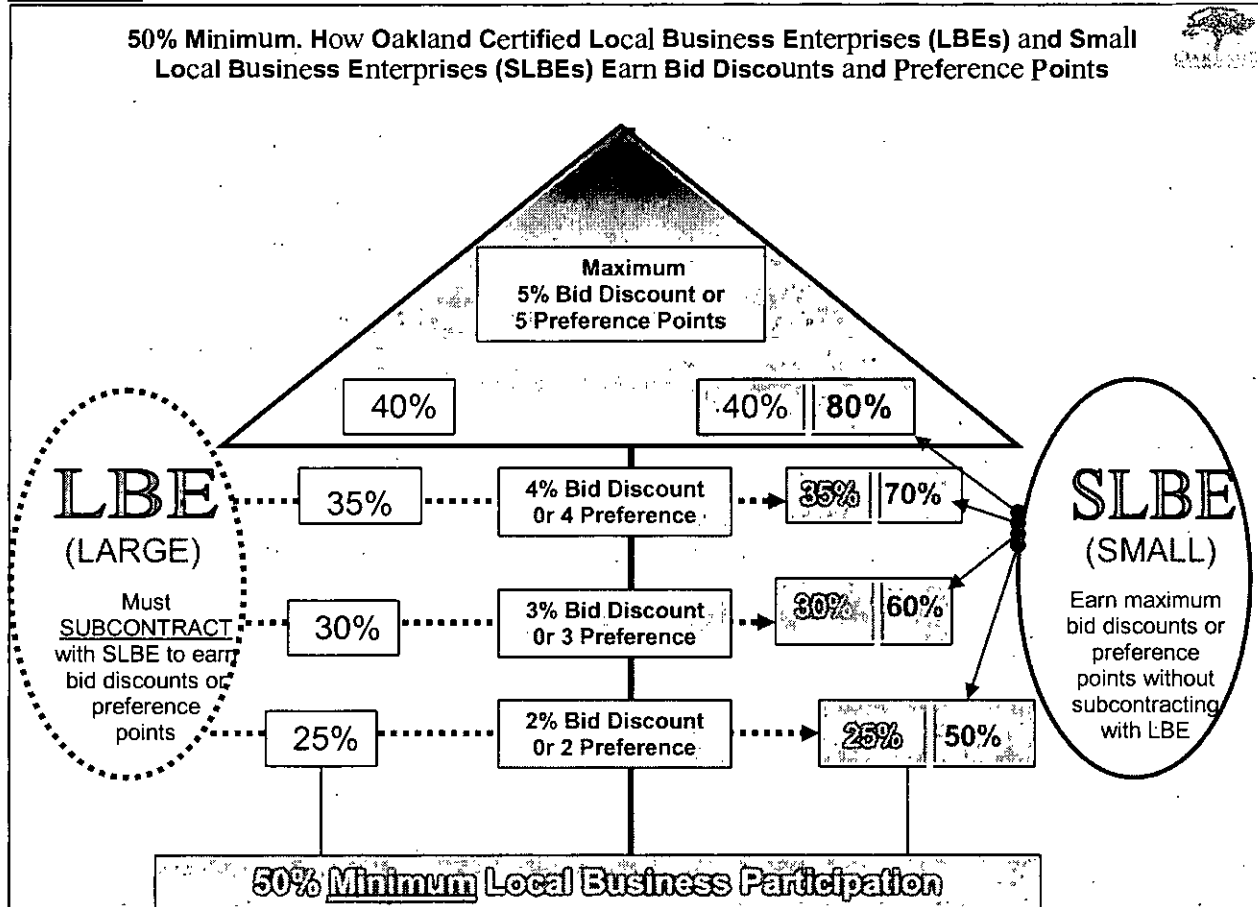
The following graphic demonstrates how a business may earn preference points and bid discounts starting at the minimum 20% up to 50% participation.

Table 4-A



If the City of Oakland applies the 50% minimum participation requirement, preference points and bid discounts would be awarded counting 50% L/SLBE participation as the baseline. Steps as described on pages 5 and 6 also apply to the graphic below.

Table 4-B



Given the economic impact, staff recommends maintaining the 5% bid discount cap as a discount increase would increase the relative project costs to the City.

The City has achieved and in many instances exceeded the 20% minimum L/SLBE participation in construction and professional services. For the past three fiscal years, under the minimum 20% L/SLBE participation the levels have been as follows:

Table 5-A

CONSTRUCTION			
	FY 07-08	FY 08-09	FY 09-10
LBE	17%	15%	10%
SLBE	20%	24%	27%
TOTAL	37%	39%	37%

Table 5-B

PROFESSIONAL SERVICES			
	FY 07-08	FY 08-09	FY 09-10
LBE	16%	21%	18%
SLBE	15%	10%	13%
TOTAL	32%	31%	31%

Item: _____
 CED Committee
 May 24, 2011

However, when construction projects are viewed according to work type, it should be noted that in some work types contractors historically and consistently achieve at least 50% L/SLBE participation or above. Staff considered several project work types to include: streets, traffic signals, sewers bridges, tree pmning, and building. Total L/SLBE participation for the past three fiscal years shows the majority of the work types achieved at least 50% L/SLBE participation:

Table 6-A - Construction

Work Type	FY 07-08	FY 08-09	FY 09-10	Average
Streets	92%	81%	62%	78%*
Sewers	80%	62%	50%	64%*
Traffic Signals	53%	57%	44%	51%*
Bridges	0%	98%	100%	66%*
Tree Pmning	54%	68%	70%	64%*
Building (new & renovation)	40%	41%	48%	43%
Housing	22%	29%	32%	28%
Other	70%	14%	96%	60%*

Table 6-B - Professional Services

Work Type	FY 07-08	FY 08-09	FY 09-10	Average
Architecture & Engineering	35%	60%	66%	50%
Consulting	100%	100%	23%	74%
Environmental	56%	80%	52%	63%
Direct Services	100%	0%	49%	50%
Maintenance	100%	100%	0%	67%

In an effort to ensure maximum participation, staff recommends setting the participation requirement at 50% (25% LBE and 25% SLBE) and set project specific participation for housing and building of new and renovation of existing stmrctures on a project by project basis starting with the assumption of 50% and move up or down according to availability.

The jump from a minimum 20% required L/SLBE participation to 50% is actually not a very large jump when viewed from the perspective of subcontractor participation. The increase for an LBE is 15% more to satisfy the minimum 25% 25% split. Non local firms will realize the greatest impact with a 30% increase from 20% to 50%. With the additional Very Small certification, as will be the case for all prime contractors and consultants, non local businesses will be able to realize double participation when subcontracting with Very Small Local Business Enterprises.

Banking Credits: The Finance and Management committee questioned the use of “Banked Credits”. Staff advised that very few contractors have taken advantage of the opportunity to apply for and use “Banked Credits”. Those firms that eam more than 50% are typically certified

as SLBEs and have a built in capacity to exceed participation requirements. Staff recommends removing "Banked Credits" from the L/SLBE Program.

(3) Contractors L/SLBE Prequalification Program (new)

Staff will return to Council at a later date with a full vetting of the contractors' prequalification program and processes for award of contracts

Business Feedback

- Staff met with representatives from local chambers of commerce to discuss the recommendations presented in the previous report to Council. In these discussions, several comments were brought forward:
 - Most were not in favor of 10% and 15% of current SBA Size Standards
 - Most preferred moving back to 30% of current SBA size standards and adjust as standards are adjusted if the Standards are doubled or tripled
 - All supported the new certification categories
 - Most support the increase in local participation from 20% to 50%
 - Most support the Contractors L/SLBE Prequalification Program (previously referred to as "rotation") and were OK with flexibility in soliciting responses from the pre-qualified pool of local certified firms

- Staff also held an open forum to obtain input from local certified contractors regarding proposed changes to the Program. Invited participants included certified contractors, Chambers and membership organization. A number of questions were raised and responses provided. For example:

	QUESTIONS/COMMENTS	RESPONSES
1	What is the purpose of the new "very small" category?	To stimulate the growth of emerging and start up businesses.
2	Is start up a generic term?	Yes. It means a business in operation for less than a set amount of time usually 1-3 years depending upon the industry and the business is in the very early stages of development.
3	Will a satellite office count?	An extension of a home office or larger operation.
4	How many firms are there with a 3-year average gross receipt of \$375,000?	Roughly 2-3% of our existing pool. More will approach the City if the certification is available.
5	Is very small for all industry categories?	Yes, however, average gross receipts may vary by industry.
6	Will there be preferences for very small?	Very small will earn double the credit.

7	How often would you pre-qualify? 1, 2, 3 years?	Frequency rests with the using agency. The standard practice is a two year period.
8	Local certified contractor suggested a yearly pre-qualification application	This remains an option for the using agency and is cost efficient to stay with the list for 2 years if the pre-qualified pool agrees to hold their price.
9	What incentives can be given to primes for rotating?	None at this time.
10	Can the city establish an encouragement or rotation program for truckers?	Yes. However, trucking is typically subcontracted out by the prime.
11	We would like it if you maintained current formula of most recent size standard 2010. If there are significantly large jumps in national size standards, maintain at 30% 2010 standards.	The recommendation moving forward is to take 30% of the most recent (current) SBA Size Standard.
12	Why give preference points to non-Oakland businesses?	Oakland certified firms get work with non-local firms and opportunities are increased.
13	We should have a 100% local hire policy.	Currently we have a 50% LEP that includes 50% new hire for construction.
14	Why not have an L/SLBE "Trucking Prequalification Program" and rotate the use of local certified truckers?	The City very rarely contracts out directly for trucking services. It is typically a subcontracting element of projects.

As responses to the questions were provided and in-pur consolidated, staff suggests looking into a revised trucking program to encourage a greater distribution of work among the list of Oakland certified truckers. Currently, primes are choosing the same two to three truckers and work is not distributed. Overall, businesses support Council's policy directions.

Items 1 and 2 below were added in response to council discussions regarding credit for employing Oakland residents and credit for being a local firm regardless of business size or level of participation. With that in mind, staff recommends the following for your consideration:

1. Preference Points for Local Hire or Non-Construction contracts

Earning extra preference points for having an existing work force that includes Oakland residents is considered added value. The Request for Proposal "evaluation" process allows for additional preference points over and above the number of points earned for technical expertise. Typically 100 points may be earned for the technical elements of the RFP. Preference points are awarded over and above the potential 110 points. Staff recommends awarding preference points for an Oakland workforce according to the percentage of Oakland residents as follows:

- 25% of workforce is made up of Oakland residents = 1 preference point

Item: _____
 CED Committee
 May 24, 2011

- 50% of workforce is made up of Oakland residents = 2 preference points
- 75% of workforce is made up of Oakland residents = 3 preference points
- 100% of workforce is made up of Oakland residents = 4 preference points
- Hiring Oakland residents in vacancies = 1 additional point at Project end.

Given the above, Local and Non-local businesses may earn up to 4 preference points for having a workforce that is made up of Oakland residents and one additional point for hiring Oakland residents during the life of the contract. The new hire element will be determined at project end.

2. Preference Points for local certified firms regardless of size and participation

On Request for Proposals, Request for Qualifications or any negotiated agreement, local certified firms will earn credit regardless of business size or level of L/SLBE participation at a rate of 1 point for every 5 years in business in Oakland. Capped at 5 preference points.

Given the above local hire options, businesses may earn up to 9 preference points prior to contract award and one additional point at project end.

(4) Penalties and Monitoring

- Monitoring processes/procedures
- Penalty schedule

The City of Oakland covers the cost of monitoring projects through DCP staff salaries. The cost of monitoring projects is related directly to the staff time to complete all of the tasks associated with monitoring the project. This brings to bear the work of the Contract Compliance Officer Senior, the Contract Compliance Officer, the Contract Compliance Officer Assistant, and the Contract Compliance Field Technician, Employment Services Supervisor, Job Developer as well as other support staff. Since every project is different, and some projects are more complex than others, costs can be estimated based on the estimated time to monitor a project from start to finish. Project monitoring includes, but is not limited to: compliance analysis to determine the level of L/SLBE participation that can be anticipated and agreed to at the time of award; site visits to determine whether the contractor is maintaining the agreed upon L/SLBE participation levels at the time of contract award and project closeout, where compliance staff collects and reviews exit affidavits to ensure that L/SLBE participation levels were met. Staff ensures that the prime contractor has not made any illegal substitutions, that the subcontractors are present and doing the work that they are hired to do and that the workforce is being paid prevailing wages. Contractors who are not in compliance are assessed penalties as specified in the City's Program.

Penalties are assessed against contractors under three circumstances:

- (1) If the contractor fails to maintain the level(s) of L/SLBE participation listed at the time the contract is awarded. In this instance, at the time that the Compliance Officer performs close out of the project, if the contractor has not maintained the level of L/SLBE participation as agreed upon at the time of award, then the penalty is withheld from the contractor's final payment equal to the difference between the amount that was listed at award and achieved at project closeout.
- (2) If during the project, staff requests records, and/or pertinent documentation in the course of monitoring the project and the contractor does not respond within the specified time period, typically ten (10) business days. In this instance, a penalty of 1% of the contract amount or one thousand dollars (\$1,000) per day (whichever is less) may be applied if records are not timely provided.
- (3) When an illegal substitution is made, in each case, penalties and/or other sanctions can be applied against the contractor. All collected penalties are deposited into the general fund. In this instance, if an illegal substitution has occurred then a penalty of 100% of the subcontract amount is assessed.

RECOMMENDATIONS

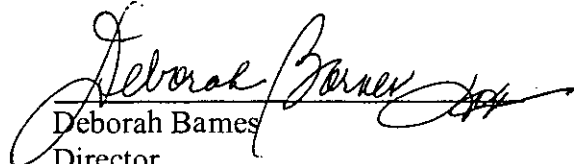
Staff recommends the following:

- A. Maintain the existing percentage of 30% using the most recent or current published SBA size standard starting with 2010 and adjust according to published standards. Return to council for alternative options if national standards double.
- B. Setting the participation requirement at 50% (25% LBE and 25% SLBE) and set project specific participation for housing and building of new and renovation of existing structures.
- C. Delete banked credits from the L/SLBE Program.
- D. Expand the preference point awards to credit local certified business regardless of size or level of subcontracting with certified firms.
- E. Expand the preference point awards to credit businesses for hiring Oakland residents.

ACTION REQUESTED OF THE CITY COUNCIL

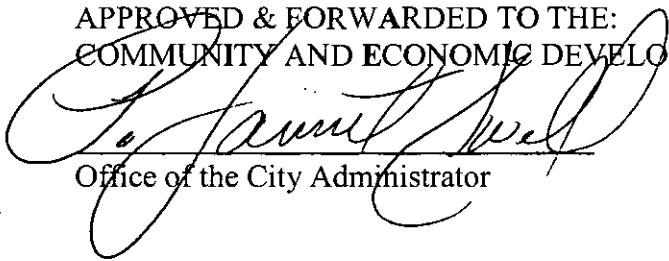
Staff recommends that the City Council approve the recommendations set forth in this report.

Respectfully submitted,


Deborah Barnes
Director,
Department of Contracting and Purchasing

Prepared by:
Mary Mayberry, ASM I
Administration Unit

APPROVED & FORWARDED TO THE:
COMMUNITY AND ECONOMIC DEVELOPMENT COMMITTEE


Office of the City Administrator

Item: _____
CED Committee
May 24, 2011